THE CONVEYANCER AND PROPERTY LAWYER

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CONVEYANCER'S NOTEBOOK.

In this Volume an addition to our policy has been made by including cases on family law. The enormously increased importance of the law relating to nullity and divorce as well as the growth of adoption makes family law an essential branch of the conveyancer's learning and we think that subscribers will not feel that we have made an unnecessary extension of our range. At the same time we have included an article on separation deeds. Some recent decisions have indicated certain dangers in drafting these instruments and it seemed convenient to incorporate the points into a general article. It is proposed from time to time to include other articles bearing on the topic of family.

Another slight change that is made is the segregation of the notes of Charity cases. The variety and complexity of these cases indicates a need for special treatment. Of recent years the decisions on this branch of the law, already sufficiently obscure, have not made it easier for the practitioner. As considerable property is not infrequently involved and usually the trustees cannot fall back on indemnities, etc., as a means of solving their problems it is perhaps inevitable that rather more attention is directed to this subject than the actual number of transactions would seem to warrant. The editorial difficulty of achieving a correct balance is prejudiced by uncertainty in the law.

We take this opportunity of repeating that the Editors welcome the submission of precedents from subscribers (which will be paid for if published). It is obvious that precedents relating to family law will be welcomed, but it has always been the policy to publish any precedents of general interest, including those relating to commercial transactions as well as more purely conveyancing forms.

Correspondence.—The increasing volume of correspondence from subscribers is an encouragement to the Editors, frequently, we are glad to say, in express terms, because it displays an interest in both articles and precedents. While the Publishers have laid down the principle that the Editors cannot provide unofficial counsel's opinion on particular

matters of no general interest they welcome correspondence on points of principle of general interest to conveyancers which can be published in the volumes of the Journal. It is, of course, only possible to deal with a limited number of such points, but the Editors will do their best.

Lighter side of conveyancing.—We have received the following letter, which we hope will encourage others to search their memories :—

Dear Sir,

Seeing your comments on humour in conveyancing in the March copy of *The Conveyancer*, I remembered some of the amusing replies I have seen to Requisitions on Title.

In a country district many of the printed restrictions are inapplicable. Such requisitions as " Please confirm that the property is separately drained into the main sewer " might be answered by " The main sewer is twenty miles away ! "

I remember, many years ago, when I received for the first time this requisition, " How is access to the property obtained? ", I replied : " Through the usual doors and gates, sometimes no doubt by climbing the fence ! " Back came a rejoinder, " Your reply to requisition No. — is ridiculous ". My reply to this was, " So is your requisition ". In due course the sale was completed in the most friendly spirit and neither of us mentioned the incident.

During the war when my firm was very short staffed I received a very lengthy batch of requisitions from a local firm ending up that the " Purchaser reserves the right to raise further requisitions. . . ." To this I replied, " See case of *Re Father William & Son* reported by Lewis Carroll in Alice's Adventures in Wonderland, Stanza 8, Lines 1 and 4 ".

There are probably many others which I have now forgotten, but I do not see why all aspects of the law should be treated in the dullest possible way, and I feel that replies to requisitions offer a chance, not often found in the office, to display a little humour.

Assents.—We have received the following communication :—

A died intestate in 1929 seised of freehold property. Her husband B was entitled to her estate which was under £1,000 in full and he obtained Letters of Administration in 1941. He died in 1945 without having made an assent to himself. In order to avoid obtaining a second grant of administration to the estate of A we propose that B's executors should assent to the vesting of the freehold property in the beneficiaries under B's will. In this assent we propose reciting :—

(1) Seisin of A at date of death.
(2) Death intestate of A, leaving B entitled to the whole estate.
(3) Letters of Administration to B.
(4) That B completed the administration of A's estate without having executed any assent or conveyance of the freehold property and was at the date of his death seised of the property in trust for himself absolutely.

(5) Death of B, appointment of executors and proof of will.

We shall be grateful if you will let us know whether you consider this assent will give a good title or not. The executors are assenting as executors of a trustee rather than of an administrator in reliance on *Re Pitt, Pitt* v. *Mann* (1928), 44 T. L. R. 371; 43 Digest 696, 1339.

Our learned correspondent, in suggesting that an *assent* should be made, seems to overlook that the principle of *Re Pitt* (*supra*) depends upon the existence of the statutory trust for sale under the Administration of Estates Act, 1925, s. 33. In that case it was held that an administratrix, who had completed administration, could appoint two new trustees in her place because she held as a trustee. Consequently, if reliance is to be put upon *Re Pitt* (*supra*) the legal estate can only pass to B's personal representatives under the Trustee Act, 1925, s. 18, and they can only deal with the legal estates as if they were trustees for sale, which means that they have no power to assent to the passing of the legal estate.

Incidentally, reliance in this example upon *Re Pitt* (*supra*) assumes that it is not necessary for an assent in writing to be made to himself as trustee for sale by an administrator notwithstanding the decision in *Re Yerburgh*, [1928] W. N. 208. It is submitted that this view is correct and that no such assent is necessary. This seems to be implied in *Re Pitt* (*supra*) and to be the natural interpretation of the Administration of Estates Act, 1925, s. 36 (4), which requires a written assent to be effectual in *vesting* a legal estate, but in this case the legal estate was already vested.

As such trustees B's personal representatives could put an end to the trust for sale by conveying to the persons who are *sui juris* and absolutely entitled (cf. Law of Property Act, 1925, s. 23). Such a conveyance would bring the whole equitable title on to the title. This would include an assent to the beneficiaries under B's will of his beneficial interest in the proceeds of sale under the statutory trust for sale, which would vest in his personal representatives as such. The assent need not be in writing, since the Administration of Estates Act, 1925, s. 36 (4) does not relate to any assent that does not pass the legal estate. Consequently, the recitals mentioned by our correspondent would require to include the will of B and the assent to the person or persons taking under the will. It would also be material to recite that A's estate was less than £1,000 since this would inevitably mean that her husband would have been entitled to the whole of her estate.

If there is more than one beneficiary entitled, however, an alternative scheme presents itself, namely, that the personal representatives of B acting in pursuance of section 18 of the Trustee Act should appoint the beneficiaries to be new trustees in place of B. This is in direct conformity with *Re Pitt, supra*, and it would be necessary only to recite that A and B were dead, proof of will of B and that the estate had been administered save for the trust for sale. A purchaser from the new trustees would be entitled to assume the continuance of the trust for sale by virtue of the Law of Property Act, 1925, s. 23. Furthermore, if there were several beneficiaries it would be necessary for them to take on trust for sale in any event, so that no additional trust for sale would be created. In such circumstances this method

would take full advantage of the statutory provisions for keeping trusts off the title and is to be preferred, particularly as it is more directly under the principle of *Re Pitt, supra.*

If only one beneficiary is to take, there is yet a third alternative that is presented by the decision in *Re Hodge,* [1940] Ch. 260 (noted 5 *Conveyancer,* p. 77, and discussed by M. M. Lewis in an article on "Assents", 9 *Conveyancer,* p. 24). In that case Farwell, J., held that for some purposes an executor-beneficiary was not required to make an assent in writing, but that an assent could be implied. This is due partly to the fact that the Administration of Estates Act, 1925, s. 36 (4) only requires a written assent to *pass* the legal estate, and as the legal estate was already vested in B in the instant case there was nothing to pass. In this case the position certainly does give rise to the apparent absurdity that B is holding as trustee for sale for himself absolutely beneficially entitled to the proceeds of sale, which, apart from statute, would be wholly absurd. If the principle of *Re Hodge, supra,* is applied and it can be recited that A's estate was wholly administered before B's death it is thought that B's legal and beneficial interest both passed to B's personal representatives who could then *assent* to or *convey* the property passing to the persons beneficially entitled under B's will. They would not assent or convey as personal representatives of a trustee, but as personal representatives of a beneficial owner. It is thought that the statutory trust for sale does not affect this position because section 23 of the Law of Property Act, 1925, does not prevent a trust for sale from coming to an end but only artificially preserves its existence in favour of a purchaser (one of the many legal fictions which serve to embarrass the law, though sometimes convenient). It is submitted that it is the height of absurdity to suppose that a sole trustee-beneficiary must convey to himself to put an end to a trust for sale which no one can enforce but himself.

In our view, the second alternative is much to be preferred, even if there is only one beneficiary, provided he can be persuaded to have someone joined with him as trustee for sale. If there is only one beneficiary who does not wish to continue the trust for sale we think the personal representatives should *convey* and rely both upon *Re Pitt, supra,* and *Re Hodge, supra,* because it seems that under one or other head the legal estate must be vested in them.

Death of last surviving tenant in common.—A somewhat similar point is raised by another correspondent arising out of an article in Volume 9 of the Conveyancer. He writes: "It is stated at page 46 of Volume 9 that in the case of the devolution of the legal estate on the death of the survivor of two or more concurrent owners, the personal representatives of such survivor may appoint new trustees and that the legal estate will vest in them by virtue of section 40 of the Trustee Act. Surely, in the light of *Re Yerburgh,* [1928] W. N. 208, this is not so, and that the personal representatives should, after the appointment, assent to the property vesting in the new trustees?"

With deference, the point raised by our learned correspondent just

misses the vital point in *Re Yerburgh, supra*, that the property was vested in the personal representatives of an owner and not a trustee. Even assuming the assent to be necessary, that case would not apply here, because the personal representatives stand in the shoes of the last surviving tenant in common as trustees and not just as personal representatives. In fact the curtain of trusteeship for sale is thereby preserved and a purchaser is not concerned to see that the trust for sale has come to an end, as it might have done if, *e.g.*, the last surviving concurrent owner had acquired the severalty beneficially in his lifetime: see L. P. A., s. 23. Actually, the real point of *Re Yerburgh, supra*, was the right of the personal representatives to appoint *themselves* as trustees; a point which was not really necessary to raise, because the Act made them trustees for sale so soon as administration was completed: *Re Pitt*, 44 T. L. R. 371. The personal representatives had rather contemplated appointment under A. E. A., s. 42, than becoming trustees for sale by the operation of section 33.

Practice in the Chancery Division where the plaintiff is an infant.—The Chancery Judges have directed that in Chancery proceedings where a plaintiff is an infant the name of the next friend should not appear in the title, but in the body of the writ of summons or originating summons, *e.g.*, " at the suit of John Jones an infant by William Smith his next friend ". In the title the plaintiff should be described as " John Jones an infant ".

[In consequence of the above direction the note to Order 16, r. 16, " Change of next friend ", at the top of page 278 of *1945 Annual Practice*, should be amended to read:

" In the Chancery Division a change, for any reason, of a next friend can only be effected by order. The practice is to apply by summons to appoint a new next friend. D.C.F.s 64 and 65 and Forms 1 and 2 on page 928 of Seton are obsolete. There must be a consent in writing of the next friend, and an affidavit of his fitness and that he has no interest adverse to that of the infant. The order may provide that the new next friend shall give security for the defendant's costs up to the time of the order ".

The affidavit in support of an application for the appointment of a new next friend should be in the following form:—

I (name and address) the solicitor for (or a member of the firm of the solicitors for) the above-named plaintiff C.D. an infant make oath and say as follows:—

1. (Reasons why the appointment of a new next friend is sought).
2. A.B. (name, address and description of proposed new next friend) is a (state relationship (if any) of A.B. to C.D.) and has no interest in the matter in question in this action (matter) adverse to that of C.D. The consent of the said A.B. to be appointed as such next friend is annexed hereto.

3. The said A.B. is a fit and proper person to act as the next friend of the said C.D.

(Note.—This form is not part of the Appendix to the Rules, but has been approved by the Chancery Judges.)]

Redemption of Building Society mortgages.—In Volume 9, at page 108, we drew attention to an opinion of the Council of the Law Society that a mortgagor is entitled to receive a discharge on paying off a mortgage and not have to accept an undertaking to produce the receipt at a later date. We observe with regret a note in the Law Society's *Gazette* for June, 1946 (p. 145), from which it appears that attempts by the council to obtain action from the Building Societies' Association have proved abortive and that the council do not feel that they can take any further steps in the matter at present. This announcement is coupled with the statement that the council have no doubt that the balance of opinion accords with their view.

We find it difficult to understand the ground upon which the building societies think that they have any right to retain documents or refuse an immediate discharge. It seems that detinue lies immediately on refusal to deliver up all title deeds including the mortagage. Secondly, to refuse to give a discharge would surely be a good ground for withholding payment of principal moneys and at the same time to decline to pay further interest? It seems to us that the matter should not be left to lie where it is.

New Towns for Old.—The New Towns Act, 1946, like some other modern legislation, gives no clear picture of the shape of things to come. Until the various regulations and orders are issued it will not be easy to see what exactly will happen. The Act is primarily an enabling Act which will function by Ministerial Orders. Consequently, in this place we can only offer a few general observations.

First, the Act enables the Minister of Town Planning to make an order designating an area for development as a new town. He is required first to consult the local authority or local authorities who appear to him to be concerned : section 1 (1). When the draft order has been prepared notice of it must be published in the *Gazette* and in papers circulating in the locality : Schedule I. The draft will then be deposited locally and can be seen. If objection is lodged within the specified time (not less than twenty-eight days) a public inquiry *shall* be heard and the Minister *shall* consider the report of the person by whom the inquiry was held. The order when made shall be registered as a local land charge : section 1 (2) incorporating Town, etc., Planning Act, 1944, s. 17. As we have remarked before, this section does not provide for the contingency of its not being registered.

From the point of view of a purchaser an area designated as a new town falls into the category of properties restrictions on which he is deemed to have actual notice by virtue of section 198 of the Law of

Property Act, 1925, if the order is registered as a local land charge. It is, therefore, vital to search prior to contract unless he is prepared to suffer the losses that may be entailed by the application of the order.

Once an area has been designated as a new town the development of it will be handed over to a Development Corporation appointed: section 2 (1); and controlled: section 2 (3) by the Minister. The development corporation is a small board not exceeding a chairman and seven other members (at least we *think*, grammatically, it is seven, but it may be six) and it has exceedingly wide powers as follows: "power to acquire, hold, manage and dispose of land and other property, to carry out building and other operations, to provide water, electricity, gas, sewerage and other services, to carry on any business or undertaking in or for the purposes of the new town, and generally to do anything necessary or expedient for the purposes of the new town or for purposes incidental thereto" (except borrow money). So expressed it is complete socialism, because presumably the development corporation could be the butcher, the baker and the candlestick maker as well as responsible for general planning. This is not really anticipated, or so it would seem. Provision is not only made for the transfer of undertakings begun by the corporation to a local authority: section 14; but also for an order of the Minister winding up the corporation altogether, where again its property will be transferred to a local authority or local authorities: section 15.

The development corporation will, under the direction of the Minister, be responsible for planning the development of the new town. The Minister will make the appropriate planning orders, but the corporation will presumably be responsible for carrying out any work involved. For this purpose land may be acquired by a compulsory purchase order made by the corporation and confirmed by the Minister. This order includes not only land *within* the area *but* also (a) adjacent land required for purposes connected with the development of the new town and (b) land, whether or not adjacent, required for the provision of services: section 4 (1). This adds a threat to persons outside the area of the new town, because it must be remembered that this acquisition is at a value that is no longer the economic value which the average purchaser would pay today. We can only suggest that in preliminary inquiries a purchaser should ask: "Is the land within an area designated for a new town or adjacent thereto or likely to be required for the provision of services thereto?" We do not suggest that this requisition can reasonably be asked of all property, but we do not know what other areas besides those round about London are likely to be affected.

The property so acquired cannot be sold freehold again without the leave of the Minister, which can only be given in exceptional circumstances: section 5 (1). If it is to be disposed of without such consent the greatest interest to be granted is a lease for ninety-nine years. In our personal opinion, this is one of the weakest spots in the whole Act. These ninety-nine-year leases are obviously intended for building leases. From personal observation and experience we would say that this is laying up a legacy of dingy and depressed dwellings and towns for our children. It is a common experience that leasehold tenants with twenty or thirty years to run will spend no penny that is not absolutely necessary upon improving and maintaining their

property. For that period of time at least the whole neighbourhood tends to sink. Unless the building contemplated is of the character that will scarcely last a hundred years, what object can be served in the public interest in limiting the term to ninety-nine years? One of the reasons given is the difficulty of enforcing covenants relating to freeholds. It is true that the present law relating to covenants concerning freeholds is very unsatisfactory both with regard to positive covenants protected by rights of entry and negative covenants. We should have thought that a more satisfactory method would have been to clarify, and if necessary alter, this law which would have been a benefit to the whole land law. In our view representations should be made for the amendment of section 5. While the law remains as it is, farsighted persons who have any love of the land will be unwise to go to new towns unless they can acquire land free of the threat of corporation interference.

Section 5 also provides that where a corporation disposes of land acquired by them they shall do so " so far as practicable ", to secure that persons living or carrying on business or other activities on land acquired by them shall, if they so desire, obtain accommodation on land belonging to the corporation on terms having regard to the price at which any such land has been acquired from them. This seems to be a provision which is incapable of enforcement unless the Court can determine what is meant by " so far as practicable ". If the Court regards this as being justiciable some interesting decisions are likely to arise because the Act provides that they *shall* have an opportunity to obtain " accommodation suitable to their reasonable requirements ".

From a conveyancer's point of view section 5 of the Act requires the closest study and is likely to prove a key section.

One of the most peculiar provisions is that of section 6 (4) which enables an owner of land within the designated area to compel the corporation to acquire his land after the expiration of seven years from the date of the order designating the area.

There are, of course, other ancillary provisions for public health, housing, and highways and other public services. All we have attempted here is to indicate the general character of the provisions. Until we can see how the corporation is to set to work it is difficult to formulate any propositions. From a conveyancer's point of view it would seem that the immediate effect of any order or threat of order would be to sterilise the land. How, for instance, executors are to dispose of it we do not see unless they take advantage of section 49 of the Finance Act, 1946, but this will not help much in the average case. One of the curious examples of this type of legislation is to be found in section 17. This section provides that the corporation is not a public authority for the purposes of the Public Authorities Protection Act. This is all to the good, because it cannot be denied that the Public Authorities Protection Act works hardship. But the section then goes on to reduce the six-year period for the limitation of actions to a three-year period. This seems incomprehensible. Why should a corporation be treated as halfway between a public authority and a private person? And why add needless complications to a branch of the law already sufficiently intricate ?

Finance Act, 1946.—The new Act has introduced a number of changes important to conveyancers. Of these we may notice section 27 which is designed to prevent evasion of surtax by settlements. As with all this type of provision it is complicated. It applies only to settlements made on or after April 10, 1946. The income of property settled is to be deemed the income of the settlor save when it is payable under the exceptions stated, *e.g.*, to an individual for his own use or applicable for the benefit of an individual named in the settlement, etc., provided that such individual is not in the service of or the solicitor or agent of the settlor. The section will need careful study in the case of any settlement made *inter vivos*. Section 46 alters the rate of death duties and section 47 makes a gift *inter vivos* liable for estate duty if made within five years of the death subject to a complicated transitional provision for gifts made prior to April 10, 1946.

Sections 48–51 contain provisions extending the power to accept land (freehold or leasehold) in payment of any death duties. There is to be established a National Land Fund for purchasing this land for the benefit of the general public.

Evidence of due execution of Articles of Clerkship.—The Law Society states that in future evidence of due execution of articles will be accepted only if in the prescribed form which is set out below :—

DECLARATION AS TO DUE EXECUTION OF ARTICLES.

We, (*a*) , of (*b*) , and (*c*) , of (*b*) , solicitor, do solemnly and sincerely declare as follows :—

I, the said (*a*) for myself say as follows :—

1. I was present on the day of , 19 , and did see (*d*) the parties to the (*e*) Articles of Clerkship bearing date the day of , 19 , now produced to me and marked " " duly sign seal and as act and deed deliver the said (*e*) Articles of Clerkship.

2. The names or signatures (*f*) subscribed thereto as of some/all of the parties executing the same are in the handwritings of the said (*g*) .

3. The name or signature set and subscribed thereto as the person attesting the due execution thereof by the said (*g*) is in my handwriting.

And I, the said (*c*) for myself say as follows :—

(*a*) Full name of attesting witness.
(*b*) Address.
(*c*) Full name of principal.
(*d*) Full names of parties to the articles.
(*e*) Insert " further " if appropriate.
(*f*) Insert copy signatures of the parties to whose execution of the articles the declarant is a witness.
(*g*) Full names of parties to whose execution of the articles the declarant is a witness.

4. At the time of the execution of the said (*e*) Articles I was and am still a duly admitted and qualified Solicitor, and have practised for upwards of five consecutive years, and have one/no other Articled Clerk, and am otherwise qualified according to Sections 17 and 18 of the Solicitors Act, 1932, and Section 1 of the Solicitors Act, 1936, to take the said (*h*) as my Articled Clerk.

5. The said (*h*) has passed the (*i*) Examination and prior to the execution of the said Articles of Clerkship obtained the consent of The Law Society to his entry into Articles of Clerkship.

And we make this solemn declaration conscientiously believing the same to be true and by virtue of the Statutory Declarations Act, 1835. Declared, etc.

CORRIGENDA.

In Volume 10, p. 182, it was stated that the Emergency Laws (T. P.) Act, 1946, continued the restriction on changing names for British subjects. This was erroneous. By S. R. & O., 504/1945, the portion of regulation 20 of the Defence Regulation relating to British subjects was revoked so that the regulation continued to operate only so far as it concerned aliens. Consequently it would seem that regulation 20 as continued by the 1946 Act relates only to aliens. We trust that our error has not caused inconvenience.

COMMON FAULTS OF OMISSION AND COMMISSION IN DRAFTING SEPARATION DEEDS AND AGREEMENTS.

By D. TOLSTOY, Barrister-at-Law.

The essence of a separation agreement is the contract by the spouses to live apart. Provided it is a valid contract to live apart, the agreement itself need not be in any particular form, nor need it be by deed or even in writing. This article is not concerned with oral separation agreements but deals only with written agreements, whether by deed (in which case the document is properly called a "separation deed") or in writing but not by deed (in which case the document is a "separation agreement"). Where there is consideration from both parties, as in the case of agreement to separate *simpliciter*, the more formal deed is superfluous, but a deed is, of course, essential where the agreement settles property or effects variation of settlements or creates obligations for which there is no consideration. It is proposed to refer throughout to separation agreements, which expression must be understood to include both separation agreements and separation deeds.

Chiefly owing to the effect which separation agreements have on

(*h*) Full name of clerk.
(*i*) Insert "Preliminary" or, if the clerk was exempt by reason of having passed some other examination, particulars of such other examination.

desertion, maintenance agreements are tending more and more to take the place of the traditional separation agreements. A maintenance agreement is merely an agreement regulating the financial position of the parties and, where necessary, the custody and maintenance of children, but omitting any provision for separation or living apart. The maintenance agreement frequently takes the form of a promise by the husband to maintain the wife and children of the marriage and, this being a *nudum pactum* the agreement must be by deed.

Though separation agreements generally follow the same lines—an agreement to live apart, provision for the wife's maintenance and for the custody and maintenance of the children of the marriage, a non-molestation clause and a provision for determining the agreement—careful consideration must be given to the terms and wording of each agreement, even in the simplest case, and sometimes the client's best interests are served by refusing to enter into a separation agreement.

The position not infrequently arises where a party who does not desire to enter into a separation agreement appears to have no practicable alternative. For instance, a wife deserted by her husband and without means may be faced, in order to obtain maintenance, with the alternatives of taking proceedings either in the Court of summary jurisdiction or in the High Court, or else she must accept her husband's offer to regularise her financial position by mutual agreement. It is where the last alternative is adopted that care must be taken to prevent the agreement from taking the form of a separation agreement unless the parties intend this result and understand the consequences which flow from it. Again, where the respondent has at the date of the agreement committed adultery, or is actually living in adultery, care must be exercised lest the agreement be construed as condonation of past offence or connivance at future adultery. The wording of the agreement is in all such cases of paramount importance and will have vital consequences on the parties' rights.

Effect of Agreement on Desertion.

A separation agreement precludes subsequent desertion, because there is thereafter consent to the separation, and such is the effect of a separation agreement even though one or both parties execute it in the *bona fide* belief that it will not affect an existing state of desertion, and though the overriding reason for the respondent's absence is his intention to desert and not the existence of the separation agreement. In the absence of fraud, duress or repudiation of the agreement—circumstances which do not fall within the scope of this article—parties are bound by the words of the agreement, whatever may have been their intention, and a document which on the face of it expresses the parties' agreement or intention to live separate and apart amounts to a separation agreement which precludes desertion. But it is frequently possible to make all the financial and other provisions which the parties desire while leaving out any reference to consensual separation, in which case a " maintenance agreement ", and not a " separation agreement ", comes into existence. A maintenance agreement does not *per se* affect existing desertion nor prevent desertion from arising thereafter.

To take simple illustrations from actual decisions: In *Long of*

Wraxall v. *Long of Wraxall* (1941), 110 L. J. P. 17, the respondent wife deserted the petitioner husband and after a year they executed a deed which made provision for the wife and the child of the marriage and recited that the wife had deserted the husband, that the parties had agreed to live separate and apart and would thenceforth live separate from each other. The Court found that the real purpose of the separation deed was, in the minds of both parties, to regulate the financial provision and to make provision with regard to the child, that the petitioner husband had understood the advice given to him by his legal advisers as meaning that the execution of the deed in the form which it actually took would not prevent him from obtaining a divorce on the ground of desertion and that he had executed the deed in this belief. Nevertheless, the Court held that the words of the deed could not be disregarded and desertion was terminated by it. The Court pointed out that no difficulty would have arisen if the deed had been confined to making financial and other provisions with regard to the wife and child. *Smith* v. *Smith* (1945), 173 L. T. 287, is a contrast to this case. There the wife had been deserted by the husband and negotiations for a separation agreement took place between their respective solicitors. The husband, through his solicitors, attempted to induce the wife to sign a separation agreement in the usual form containing a clause whereby the husband and wife agreed to live separate and apart. The wife was unwilling to sign an agreement containing this clause, and it was ultimately omitted, the agreement in its final form reciting that it was the desire of the husband to live separate and apart from his wife and making provision for the maintenance of the wife and for the custody and maintenance of the children of the marriage. The agreement also contained a mutual non-molestation clause and a mutual covenant not to institute proceedings for restitution of conjugal rights.

Pilcher, J. held that this clause did not imply any consent by the wife to a continued separation or justified the husband in remaining in desertion, so that desertion continued notwithstanding the agreement.

Thus, in *Long of Wraxall* v. *Long of Wraxall, supra*, the unfortunate petitioner failed to obtain a divorce owing to the inclusion of unnecessary words in his agreement, while in *Smith* v. *Smith, supra*, the petitioner was successful because she refused—possibly without realising the legal consequence—to be party to an agreement containing such words.

Separation Agreement Operating as Connivance.

The essence of connivance is permission or acquiescence in the respondent's adultery and a separation agreement which contains such consent amounts to connivance. It is hardly likely that any agreement would be so crudely worded as to permit expressly the commission of adultery, but such permission can be implied from the words used or from the circumstances in which the agreement was executed, and the danger arises when the petitioner knows or suspects that adultery will be resumed or committed. It is then that the circumstances in which the agreement is executed or the words used in it can amount to connivance, or may at all events cast on the petitioner the burden of disproving it.

Thus, a petitioner who knows that his or her spouse is living in adultery or has committed adultery with a particular person and is likely to continue the association is *prima facie* guilty of connivance by entering into a separation agreement and must satisfy the Court that there was no intention on his or her part to consent to adultery. The classic illustration is *Thomas* v. *Thomas* (1860), 2 S. & T. 113, where the separation deed recited that the husband had left the wife and was living with Miss H., and that " proceedings have been contemplated and threatened to be taken against him in the ecclesiastical or other proper Court for obtaining a divorce between him and his said wife ". In holding that there was clearly connivance, the Judge Ordinary gave his opinion in the form of a question : " Assume that there is no express licence for the future, but when you find a woman with a clear case against her husband say to him, ' I know you have committed adultery and I am about to sue for divorce and to get alimony, but if you will come to terms and give me a certain sum I will not take proceedings ', she being cognisant that he is living in adultery at the time, do you mean to say that is no evidence of her connivance at his continuing to do so? "

This and other cases establish the principle that where a wife enters into a separation agreement with her husband who is living in adultery, or has committed adultery with a particular woman and is likely to do so again, such a separation agreement is *prima facie* presumption of connivance and leaves on the wife the onus of rebutting such presumption. In *Barker* v. *Barker* (1824), 2 Add. 285; *Ross* v. *Ross* (1869), 1 P. & D. 734, and in *King* v. *King and Evans* (1929), 142 L. T. 162, the petitioner was in each case able to rebut this presumption by showing that in the particular circumstances he or she had no intention of giving the respondent licence to commit adultery. On the other hand, the wife petitioner in *Greenwood* v. *Greenwood*, [1937] P. 157, had known when she entered into a separation deed that her husband had lived with another woman for some thirteen years and the Court held that she could not be heard to say that there was no connivance thereafter.

The law is stringent in this respect, and it is no excuse for a wife to say that she only entered into the separation agreement in order to obtain maintenance. That will not prevent connivance. The wife may be very unwilling to consent to the husband continuing the adulterous intercourse, but she will be deemed to give her consent to it if with full knowledge of the adulterous intercourse she enters into the agreement, even if she does so under pressure of the circumstances in which she is placed and only for the purpose of obtaining an allowance (*Ross* v. *Ross, supra*; *Greenwood* v. *Greenwood, supra*; *Dotzauer* v. *Dotzauer* (1925), 41 T. L. R. 289).

Connivance is an absolute bar to divorce, and a separation agreement having this effect may have disastrous consequences. All the authorities dealt with separation agreements, and there is no direct decision as to the effect of a maintenance agreement in similar circumstances, but it is submitted that a maintenance agreement would not operate as connivance because a party does not thereunder give up any marital rights or consent to the *status quo*. Thus it follows that the parties should be dissuaded from entering into a separation agreement

if there is danger thereby of bringing about connivance; it would be safer in the circumstances not to have even a maintenance agreement, but if it is essential to make some financial provisions and provisions for custody, then let that be done by means of a maintenance and not a separation agreement.

So much for the case where the agreement *per se* raises a presumption of connivance. But the wording of the agreement can also raise this presumption and this aspect must be considered next. It is, of course, very unlikely that any separation agreement would give express licence to commit adultery. This would be the clearest case of connivance. Difficulties arise not where the words used are clear and unambiguous but where by the use of ambiguous or equivocal expressions the Court is left to choose between an innocent construction and one which could be understood as acquiescence in or indifference to future adultery. Although an innocent construction will be preferred whenever possible (*Studdy* v. *Studdy* (1858), 1 S. & T. 321; *Higgins* v. *Higgins* (1924), 41 T. L. R. 25), the incautious use of such expressions will nevertheless raise a presumption of connivance to be rebutted in any subsequent proceedings. Thus, a separation agreement which allows a wife "to live separately and apart from the husband in such manner, and at such place or places, and with such person or persons, as she shall, from time to time, think proper to choose and as if she were sole and unmarried" raises a presumption of connivance, leaving the husband to show that such was not his intention (*Barker* v. *Barker* (1824), 2 Add. 285). So also does an agreement reciting that the wife "may reside at such place or places with such person or persons as she may from time to time think fit" (*King* v. *King and Evans* (1929), 142 L. T. 162). Similarly, a covenant by a wife reciting that if she did not fulfil her part of the agreement the husband shall have full power of a husband over her, "whatever his way of living may be", raises the presumption of connivance by the wife (*Studdy* v. *Studdy* (1858), 1 S. & T. 321). In this case the Court accepted the wife's explanation that she did not intend to connive, but pointed out that had the words been (or borne the construction) "whatever his way of living may have been" or "whatever his way of living may henceforth be", the agreement would have amounted to condonation of past adultery and a licence to commit future adultery. All such words should be avoided, and they are in fact unnecessary. There is every reason to insert in separation agreements mutual non-molestation clauses and possibly a clause forbidding proceedings for restitution of conjugal rights, but there is absolutely no need to expand the agreement to live apart by the addition of words which do not in fact widen that agreement and can only have the effect of raising unwarranted complications. It is always sufficient to have a clause providing for the parties to live separate and apart, with the wife thenceforth free from the husband's control, and any additional expressions are unnecessary.

CONDONATION.

Separation agreements are effected at times when relations between the parties are strained and frequently after one or other of the spouses may have committed a matrimonial offence. It may then be necessary to consider the inclusion of a *Rose* v. *Rose* clause in the

agreement so as to wipe out the effect of any prior matrimonial offence (*Rose* v. *Rose* (1882), 7 P. D. 225; (1883), 8 P. D. 98). The clause, which acts as condonation by agreement of any prior offence, known or unknown, is as follows :—

> No proceedings shall be taken by or on behalf of either the husband or the wife against the other in respect of any misconduct or alleged misconduct which now exists or has arisen before the date hereof and any offence which may have been committed or permitted by either of them against the other is hereby condoned [and in case hereafter either shall commence or prosecute any proceedings against the other in respect of any cause of complaint which may hereafter arise no offence or misconduct which has been committed or permitted before the date hereof and no act, deed or default of either party in relation to such offence or misconduct shall be pleaded or alleged by either party or be admissible in evidence].

The words in square brackets will prevent the condoned offence from being revived by any subsequent misconduct, but without the addition of these words the ordinary rule of revival of condoned offences by subsequent matrimonial misconduct will operate (*Norman* v. *Norman*, [1908] P. 6).

A separation agreement *simpliciter* does not operate as condonation of any offence unknown to the innocent spouse, but it is not generally realised that a spouse entering into a separation agreement is thereby deemed *prima facie* to condone all offences of which he or she is aware (*Tetbe* v. *Tetbe* (1928), 140 L. T. 199; *King* v. *King and Evans* (1929), 142 L. T. 162). In both cases the husband knew of his wife's adultery at the date of the agreement, but in the first case he was "beside himself" when executing it, so much so that his solicitor refused to follow his instructions; and in the second case the husband was terrified of the co-respondent. In both cases the Court found that condonation was negatived. These decisions give a clue to the sort of special circumstances which will be sufficient to discharge the *prima facie* presumption of condonation raised by the mere existence of the agreement and, where condonation is material, it is for the solicitor to explain to his client the effect which the separation agreement may entail. If some agreement is nevertheless necessary to regulate maintenance and the custody of children, then, here again, a maintenance agreement is to be preferred to an agreement for separation.

Non-Molestation Clause.

Since the primary object of a separation agreement is to allow each party to live free from interference from his or her spouse, it is always advisable to include a non-molestation clause and, if the parties are at arm's length and such a clause is to be included at all, it should be as wide as possible. It is usually advisable to insert a similar clause in a maintenance agreement. The following is a suggested precedent :—

> Neither the husband nor the wife shall molest, annoy or interfere with the other or any member of their respective families or any of their respective friends and neither shall they the husband nor the wife institute any proceedings for a restitution of conjugal rights.

Such a clause will not stop desertion (*Smith* v. *Smith*, [1945] 2 A. E. R. 452) provided there is no agreement to separate or live apart elsewhere in the document.

DETERMINATION OF AGREEMENT.

Perhaps the most frequent—and, when acting on the husband's behalf, the most serious—fault in drawing up separation agreements is the omission to insert in the agreement proper provisions for its determination on the happening of subsequent events.

As regards the death of either party, a separation agreement (and so also a maintenance agreement) will always be construed as limited to the joint lives of the parties unless a contrary intention appears in the document (*Langstone* v. *Hayes* (1945), 62 T. L. R. 74). Unless the agreement provides for maintenance to be payable " for the life of the wife " (*Kirk* v. *Eustace*, [1937] A. C. 491) or contains some other expression indicating that maintenance is to continue beyond the joint lives of the parties, the husband's death will determine the agreement and his estate will not be liable for any further maintenance. There is, therefore, no need to provide for the determination of the agreement on death of either party except where it is intended to provide for maintenance to be paid to the wife out of the husband's estate if he predeceases her.

As regards circumstances other than death, it is obvious that when acting on behalf of a wife there is advantage in having an agreement whereunder the husband's liability for maintenance continues notwithstanding such subsequent events as the wife's adultery or a divorce. It is equally obvious that little can be more distasteful to a husband than to find himself liable to continue maintaining his wife even after he has divorced her for her adultery. This, in the writer's experience, is the not infrequent position in which husbands find themselves, realising only too late the gravity of the omission in the separation agreement. In the absence of express words the separation agreement is not determined by the wife's adultery (*Fearon* v. *Aylesford* (1884), 14 Q. B. D. 792; *Sweet* v. *Sweet*, [1895] 1 Q. B. 12), or by divorce (*May* v. *May*, [1929] 2 K. B. 386), or by nullity (*Fowke* v. *Fowke*, [1938] Ch. 774; *Adams* v. *Adams*, [1941] 1 K. B. 536) or by judicial separation (*Gandy* v. *Gandy* (1882), 7 P. D. 168, 172, 175), even though the wife be the guilty party. The husband's sole remedy in such a case is to apply for a variation of the separation agreement as a post-nuptial settlement, and this he can only do on a divorce or nullity (Judicature Act, 1925, s. 192). Even so, the remedy is not altogether satisfactory, since the Court will not generally extinguish the guilty wife's interest under the agreement, though it will add the *dum casta et sola* clause (*Cooper* v. *Cooper*, [1932] P. 75). But where it is the wife who divorces the husband, the husband would have an almost hopeless task in trying to vary his liability under the agreement, and " the records of the Court will be searched in vain for any instance where the Court, at the instance of the guilty party, has varied or annulled the settlement in his favour " (*Reid* v. *Reid*, [1926] P. 1).

Care must, therefore, be taken when advising on behalf of the

husband that the agreement contains provision for its determination if the wife commits adultery, or if divorce, nullity or judicial separation supervenes. The following clause would cover these contingencies :—

> If the husband and the wife shall at any future time come together and cohabit or if their marriage be dissolved or annulled, or if they be judicially separated or if the wife be unchaste this agreement shall thereupon determine and all the foregoing provisions and stipulations shall thenceforth be null and void.

This clause has the effect of determining the agreement where the marriage is brought to an end or there is a judicial separation with the husband being the guilty party, but in that event the wife will obtain maintenance or permanent alimony, as the case may be.

The above clause also makes provision for determination of the agreement on a resumption of cohabitation. This is the one event for which provision is usually made in separation agreements and which is in fact unnecessary, as a separation agreement *simpliciter* is automatically determined by a resumption of cohabitation (*Eaves* v. *Eaves*, [1939] P. 361). It is only rights of a permanent nature, such as a transfer of property (*Nicol* v. *Nicol* (1886), 31 Ch. D. 524) or a settlement on the children of the marriage (*Re Spark*, [1904] 1 Ch. 451), which are not abrogated by the resumption of cohabitation, and it is doubtful to what extent, if at all, the insertion of an express provision for determination of the agreement upon a resumption of cohabitation can affect the legal consequences. However, the presence of this provision has the merit of bringing to the notice of the parties—who may not be lawyers—the effect of a resumption of cohabitation and should be inserted for this reason so as to avoid any doubts on the point.

Variation of Amount of Maintenance.

As has been stated, an agreement cannot be varied or revoked on the happening of subsequent events (except on a resumption of cohabitation) unless it contains express provision to that effect. Whatever may be finally agreed with regard to such matters as the wife's adultery or divorce, it may often be advisable to make provision for variation of the amount of maintenance payable in the event of an alteration of financial circumstances. The wife may feel content to have a definite fixed sum, but her husband's means may later increase when she would be glad of a revision of the amount of maintenance. Similarly, a husband may later find himself quite unable to keep up the agreed instalments and may be willing to pay a larger amount immediately if he knows that the amount is subject to revision if his means were to diminish.

In the following clause, which makes allowance for a variation in the husband's income, arbitrary figures have been inserted by way of illustration :—

> Provided always that if in any financial year ending April 5 the husband's total income as calculated for the purposes of income tax shall exceed £1,000 or be less than £800, then and in every such case one-third of the amount by which his said income exceeds £1,000 or is less than £800 shall be paid in addition to or deducted from (as the case may be) the said weekly payments of £5 provided that

in the case of an addition to the said weekly payments the addition may at the option of the husband be paid either in a lump sum on July 5 next following or in fifty-two equal weekly instalments commencing July 5 next following, and in the case of a deduction from the said weekly payments the husband shall give notice thereof to the wife on or before July 5 next following and the deduction for the year shall be made by equal instalments from the next fifty-two weekly payments falling due hereunder but provided that in no case shall the weekly payment to the wife be less than £2 and no deduction may be made in respect of a diminished income during any financial year more than twelve months after July 5 next following the end of that financial year.

MAINTENANCE OF CHILDREN.

Where it is the intention of the agreement to provide for the maintenance of children the agreement should always state the amount of such maintenance independently of the amount payable to the wife, because otherwise complications are apt to arise if a child dies or when he reaches the age when his maintenance is no longer required. The agreement should also provide up to what age the maintenance is payable for each child.

CUSTODY AND ACCESS.

Where there are young children of the marriage it is usually advisable to provide for one or other of the spouses to have their custody, as this provision may avoid subsequent disputes over the children's education, etc. Again, in order to avoid subsequent disputes —culminating, possibly, in proceedings for access—the spouse not given custody should be expressly given access to the children. If the spouses are at arm's length and are not likely to agree amicably on the details of access as and when they arise, then the agreement should stipulate how and when access is to be given, *e.g.*, a fortnight in each school holiday. But if a precise definition is unnecessary or impracticable in the particular case, a simple provision for reasonable access should always be inserted, thus protecting the particular spouse's rights to access generally. No agreement by the parties can in fact oust the Court's jurisdiction to make orders as to custody or access (*Bishop* v. *Bishop*, [1897] P. 138), but in practice the Court would not in the absence of good reason vary provisions freely arrived at by the two spouses. It is in most cases sufficient to provide for custody up to the age of sixteen, but twenty-one may be the more appropriate age in cases where the child's education will be continued until he is of age.

INCOME TAX AND SURTAX.

Husbands and wives who enter into separation or maintenance agreements are often blissfully ignorant of the law regarding the deduction of income tax from payments under such agreements and it is the solicitor's responsibility to explain the incidence of tax at the time. For instance, the husband may have been making a voluntary allowance to his wife of, say, £2 a week, without thought for income tax, and then the parties enter into a formal agreement to pay this

amount. Provided the agreement is one which might last more than a year—which would include an agreement for the life of one or for the joint lives of both parties—the husband is bound to deduct income tax from each instalment and to account to the Inland Revenue for such tax, leaving the wife to reclaim the tax if her circumstances entitle her to do so (Income Tax Act, 1918, General Rule 19; *Taylor* v. *Taylor*, [1938] 1 K. B. 320). Obviously, the wife must be told that such will be the effect of the agreement and that she will be obliged to manage on half the stipulated allowance (assuming income tax at 10s. in the £) until she can make her first reclaim.

A stipulation to pay the allowance without deduction of tax is void as regards the deduction, and income tax may be deducted notwithstanding the stipulation (Income Tax, 1918, General Rule 23 (2)). An agreement to pay a sum " free of income tax " is similarly ineffective to prevent deduction of income tax (*Blount* v. *Blount*, [1916] 1 K. B. 230). But an agreement for the payment of " such a sum as after deduction of income tax amounts to " a given sum is valid (*Booth* v. *Booth*, [1922] 1 K. B. 66). Where the agreement is of the last kind the husband's liability will vary from year to year, according to the rate of income tax; thus, with income tax at 10s. in the £ the husband will pay a total of twice the agreed sum—the agreed sum to the wife and a similar amount by way of income tax, it being open for the wife to reclaim the tax if she is entitled to do so.

The words " income tax " *prima facie* include surtax and an agreement to pay " such sum as after deduction of income tax amounts to " a given sum will probably be construed as entitling the wife to call on the husband to discharge her surtax, as well as income tax, in respect of the agreed amount (*Re Reckitt*, [1932] 2 Ch. 144; *Re Skinner*, [1942] 1 Ch. 82). Comparatively few husbands and wives will be affected by surtax, but where such is the case the agreement should provide for the payment of " such sum as after deduction of income tax but not of surtax amounts to " a given sum (*Re Skinner*, *supra*).

Stamp Duty.

Every written agreement not under deed must bear a sixpenny stamp and every agreement under deed must bear a ten-shilling stamp (Stamp Act, 1891, s. 1; Sch. I). In addition to this duty an agreement for life or any other indefinite period is charged with stamp duty of 2s. 6d. for every £5 or fraction of £5 of the annuity or sum periodically payable (*ibid.*). This duty is charged on the sum expressed to be payable weekly, monthly or at any other recurrent period and not on the total amount payable in a year, unless the sum is expressed by reference to a year (*Hennell* v. *C. I. R.*, [1933] 1 K. B. 415), so that stamp duty can be saved by a careful selection of phraseology. Thus, an agreement to pay £104 a year by instalments of £2 a week will attract a duty of £2 12s. 6d., but an agreement to pay £2 a week (with no reference to the year) requires only a 2s. 6d. stamp. Similarly, a saving of £24 17s. 6d. can be effected by expressing an agreement to be for £2 14s. 6½d. a day instead of for £1,000 a year!

ADVERTISEMENTS AND AMENITY.

THE DECISION IN *MILLS & ROCKLEYS, LTD.* v. *LEICESTER CORPORATION.*

By DESMOND HEAP, LL.M., L.M.T.P.I.,
Deputy Town Clerk of Leeds.

One of the principal objects of planning in its widest sense is the creation of new amenities and the preservation of existing ones. This is recognised by the provisions of the very first section of the Town and Country Planning Act, 1932 (hereinafter referred to as " the 1932 Act ") which provides that a planning scheme may be made with the general object of (*inter alia*) " securing . . . amenity and convenience . . . and generally of protecting existing amenities ". Neither of the words " amenity " or " amenities " is defined in the 1932 Act, but in *Ellis and the Ruislip-Northwood Urban District Council*, [1920] 1 K. B. 343, Lord Justice Scrutton, speaking of the provisions of an earlier planning enactment, the Housing, Town Planning, etc., Act, 1909, said at p. 370, " The word ' amenity ' is obviously used very loosely; it is, I think, novel in an Act of Parliament, and appears to mean ' pleasant circumstances or features, advantages ' ".

It is probably beyond all argument that pleasant circumstances, features and advantages, especially in country areas, can be completely destroyed by the indiscriminate exhibition of advertisements, however well designed the latter may be. Indeed, it may well be argued that the more garishly designed an advertisement is, the more shockingly will it stand forth and thereby the more effectively achieve its purpose of drawing attention to itself and to that which it seeks to advertise. Accordingly, a planning authority, when preparing a planning scheme under the 1932 Act, will probably seek to control the exhibition of advertisements in some portions, if not the whole, of the area to which the planning scheme relates and especially in those portions comprising open, unbuilt countryside and " places of natural interest or beauty ", to quote once again the words of section 1 of the 1932 Act.

The extent of the control which can be exercised over advertisements through the medium of a planning scheme has not by any means been left solely to the good taste and discretion of the planning authority responsible for preparing the scheme. On the contrary, the Legislature has set out explicitly just how far this control may go under an operative scheme and the relevant statutory provisions are to be found in section 47 of the 1932 Act. This section contains within itself the whole of the powers which may be exercised under an operative planning scheme with respect to advertisements and sub-section (1) of section 47 provides as follows :—

> (1) Where it appears to the responsible authority that an advertisement displayed or a hoarding set up in the area to which a scheme applies seriously injures the amenity of land specified in the scheme as land to be protected under this Act in respect of advertisements, the authority may serve in the prescribed manner upon the owner of the advertisement or hoarding a notice

requiring him to remove it within such period, not being less than twenty-eight days from the date of service of the notice, as may be specified therein, and where any such notice is served a copy thereof shall be served in the prescribed manner upon the owner and occupier of the land on which the advertisement or hoarding is displayed or set up.

The first point to note about the powers of section 47 (1) is that they are not available otherwise than to *a responsible authority* acting under an *operative planning scheme* and even then to such an extent only as may be set out in the scheme itself. In other words, the powers may be operated only as regards such land in the area covered by the scheme as is specified by the scheme itself as being land to be protected under the 1932 Act in respect of advertisements. This is a matter which will have to be considered in the first place not by the *responsible* authority whose duty it is to enforce the provisions of the scheme when it comes into operation, but by the *planning* authority whose duty it is to make the scheme. If the planning authority when preparing the scheme has inserted in the scheme the requisite clauses declaring specified land to be land protected under the 1932 Act in respect of advertisements, then when the scheme ultimately comes into operation the responsible authority under the scheme may take such action as is set out in section 47 (1) if it appears to that authority that the amenity of such land is being, not merely injured, but seriously injured, by an advertisement which has been displayed or by a hoarding which has been set up.

It is, of course, an outstanding and well-known characteristic of section 47 that its provisions do not begin to operate until a planning scheme has first come into operation. Action under section 47 cannot be taken by any authority other than "the responsible authority" which means (by section 11 of the 1932 Act) "the authority . . . responsible for enforcing and carrying into effect the provisions of the scheme". It is clear that no authority can be such a responsible authority as is here mentioned unless and until the planning scheme in connection with which the authority is to act as responsible authority has itself come into operation. Moreover, sub-section (1) of section 47 speaks of "an advertisement displayed or a hoarding set up in the area to which a scheme *applies*". A scheme cannot, of course, apply to any area until it has first come into operation. Thus, the provisions of section 47 do not begin to operate until a planning scheme comes into operation, and even when this occurs the responsible authority seeking to exercise control over advertisements through the medium of its scheme will have to wait until there has been some actual and serious injury to amenity before it can take action, the responsible authority's role being limited to curing, and not preventing, injury to amenity.

The powers of section 47 becoming available to a responsible authority only when, as has been shown, a planning scheme has come into operation, there has been much thought as to what control, if any, can be exercised over the display of advertisements on land which it is proposed should "be protected . . . in respect of advertisements" in a planning scheme during the period of preparing the scheme, or, in other words, during *the interim period* which must elapse between the

date when the resolution of the planning authority to prepare the scheme—the planning resolution—takes effect by receiving the approval of the Minister of Town and Country Planning under section 6 (2) of the 1932 Act or section 1 (1) of the Town and Country Planning (Interim Development) Act, 1943 (hereinafter referred to as " the 1943 Act ") as the case may be, and the date when the planning scheme ultimately comes into operation. During this interim period any development of land taking place within the area to be included in the planning scheme then in course of preparation will constitute " interim development " by virtue of section 10 (1) of the 1932 Act, and in this connection it is to be noted that by section 53 of the 1932 Act " development " includes not merely building or re-building operations but also any change in the use of land or buildings.

Before the coming into operation of the 1932 Act on July 22, 1943, it was advisable, though not obligatory, for any person carrying out interim development of land as above defined to get the consent of the appropriate interim development authority. Applications for such consent were formerly dealt with by an interim development authority under the provisions of section 10 of the 1932 Act and the Town and Country Planning (General Interim Development) Order, 1933, and any decision which an interim development authority came to on an application for consent to interim development was not enforceable by the authority nor could action be taken by the authority in respect of interim development carried out without any application for permission in connection therewith first being made to the authority. The effect, however, of the 1943 Act was to make interim development control just as enforceable by an interim development authority as is planning control under an operative planning scheme by a responsible authority with the result that to-day if a person indulges in interim development without the consent of the appropriate interim development authority granted under section 10 (3) of the 1932 Act and subject to the provisions of the Town and Country Planning (General Interim Development) Order, 1946, or if a person indulges in interim development contrary to the terms on which consent has been granted by an interim development authority, the interim development authority can, in either of these two cases, take action under section 5 of the 1943 Act, sub-section (1) of which provides as follows :—

> (1) If while a resolution to prepare or adopt a scheme under the principal Act [*i.e.*, the 1932 Act] is in force with respect to any area, any development of land within that area is carried out after the commencement of this Act otherwise than in accordance with the terms of the interim development order or of permission granted under that order, then, subject to the provisions of this section, the interim development authority may, if they are satisfied that it is necessary or expedient so to do having regard to the provisions then proposed to be included in the scheme—
>
> (a) where the development consists of the erection, construction or carrying out of any building or work or any part of a building or work, remove or pull down the building, work or part;

(b) where the development consists of any use of the land or any building thereon, by order prohibit that use, and, where necessary, reinstate the land :

Provided that where it is reasonably practicable, by means of alterations or of the execution of any other works, to bring any such building or work into compliance with any permission granted as aforesaid, the interim development authority shall, instead of removing or pulling down the building or work, carry out those alterations or works so far as appears to them to be necessary or expedient as aforesaid.

In seeking to control the exhibition of advertisements and thereby preserve amenity during the interim period which must elapse before a planning scheme comes into operation, one would have thought that it would have been possible to resort to the powers of control given by section 5 of the 1943 Act. For the purposes of argument there may be taken the case where, during a period of interim development, an advertisement is painted on the gable of a cottage in the heart of the countryside. The first point to be settled, of course, is : Does this constitute interim development at all? It is submitted that it does because " development " includes, by virtue of section 53 of the 1932 Act, any *change of use*, and in the present instance there is clearly a change of use of the gable of the cottage when the advertisement is painted upon it. Before the painting of the advertisement the gable has one use only and that is to form part of, and be a support to, the cottage. This is its indispensable purpose. After the painting of the advertisement the gable is used not only for this indispensable purpose of supporting the cottage but also for a secondary and entirely new purpose, namely, that of displaying an advertisement. Such display, accordingly, involves a change of use and constitutes " development " and, taking place during the interim period prior to the coming into force of a planning scheme, constitutes " interim development ".

This being so, one would have thought it necessary for an application for consent to such development to be made to the appropriate interim development authority who, subject always to the provisions of the Town and Country Planning (General Interim Development) Order, 1946, could (under section 10 (3) of the 1932 Act) have granted the application unconditionally or subject to conditions or have refused it, or could (under section 2 of the 1943 Act) have postponed consideration of the application. In the event of such development being carried out without the consent of the appropriate interim development authority, or contrary to the terms of any such consent, one would have thought it would have been open to the interim development authority to avail itself of the provisions of section 5 (1) (b) of the 1943 Act and make an order prohibiting the development, that is to say, prohibiting the exhibition of the advertisement on the gable of the cottage. Such, one would have thought, was the law concerning the exhibition of advertisements during a period of interim development, but the recent decision in *Mills and Rockleys, Ltd.* v. *Leicester City Council*, [1946] 1 K. B. 315, makes it clear that this is not the position at all.

In this case a planning scheme was in course of preparation by the

Leicester Corporation who, in relation to the scheme, were both the planning authority and the interim development authority. The complainants had a dwelling-house within the area covered by the proposed planning scheme and in July, 1944, that is to say, after the coming into operation of the 1943 Act, they painted on the exterior wall of the house two white panels each twenty feet by ten feet, with the intention of displaying advertisements thereon. No application was made to the Leicester Corporation as the appropriate interim development authority for their consent to this " development " of the exterior of the dwelling-house. In October, 1944, the Corporation resolved that certain areas (including one where the dwelling-house was situated) within the proposed scheme were proposed to be protected under the 1932 Act in respect of advertisements, and in November, 1944, the Corporation sought to take action under section 5 of the 1943 Act by making an order prohibiting the use of the exterior wall of the dwelling-house for advertising purposes. The Corporation contended that they were entitled to make such an order by virtue of their powers under section 5 (1) (b) of the 1943 Act and that the Corporation's powers under section 5 were not limited by the provisions of section 47 (8) of the 1932 Act. For the complainants it was contended that the 1943 Act merely gave the Corporation the right to exercise such powers as they might have under the scheme when in force and did not extend such powers and, accordingly, the Corporation had no power to prohibit the advertisement in question. The Leicester City Justices, before whom the matter came in the first place, held that the painting on the wall was a " development " within the meaning of section 5 of the 1943 Act and that that section was not limited or affected by section 47 of the 1932 Act and they therefore decided that the Corporation were entitled to make the proposed order. Against this decision the complainants appealed to a King's Bench Divisional Court which held that, as there was nothing in the 1943 Act which cut down the emphatic provisions contained in section 47 (8) of the 1932 Act against the inclusion in a scheme of any provision prohibiting or controlling the use of structures for the purpose of advertising, the proposed order of the Corporation was bad and must be set aside.

This decision is of first-rate importance both to those who are concerned with the business of advertising and also to those authorities who are interim development authorities interested in seeing that during the period of interim development which elapses before a planning scheme comes into operation no development shall take place which will unduly prejudice provisions which it is proposed to insert in planning schemes then in course of preparation. The effect of the decision is to make the restrictive limitations of section 47 (8) of the 1932 Act *applicable to the interim period which elapses before a planning scheme comes into operation.* This is interesting, because it is not likely that the operation of section 47 will have hitherto been associated with the interim period at all in view of the fact that the section relates to advertisements and hoardings " set up in the area to which a scheme applies ", and a scheme cannot be said to apply to any area until it comes into operation at which point of time the interim period and all interim development, at least as far as that particular scheme is con-

cerned, immediately comes to an end. Section 5 of the 1943 Act, on the other hand, deals exclusively with the interim period and has no application after a planning scheme has come into operation. In other words, these two sections deal with entirely separate periods, section 47 not beginning to have effect until section 5 has ceased to have effect and, accordingly, one would have thought that the control exercisable over interim development (including interim development involving the exhibition of advertisements) under section 5 was entirely separate from, and possibly wider than, the control exercisable over the exhibition of advertisements under section 47 and the provisions of an operative planning scheme. In short, one would have thought the two sections were in effect mutually exclusive, but it is now authoritatively shown that this is not so and many are the interim development authorities desirous " of protecting existing amenities " who will lament the fact.

Interim development authorities may find certain of the remarks of the Court in this case not a little difficult to follow. For example, Lord Goddard, C.J., at p. 317, observes : " Certain provisions of the principal Act [*i.e.*, the 1932 Act] are repealed by section 2 of the Act of 1943, but section 47, which deals with the powers of the planning authority with respect to advertisements, is not, so far as I can see, affected in any way ". This is not surprising if one bears in mind the fact that whilst section 47 deals with provisions in operative planning schemes, the whole of the 1943 Act relates solely to the interim period which elapses before a planning scheme comes into operation and has no application whatsoever to any period thereafter.

Again, the Lord Chief Justice, at p. 318, after quoting the restrictive provisions of section 47 (8) of the 1932 Act, says : " But it is perfectly clear that a *scheme* must not contain a provision which prohibits or controls, otherwise than is provided in the section, the erection or use of structures for the purpose of advertising. That is just what the interim *order* in this case does, since it prohibits the use of this particular wall as an advertising station ". It will be noticed from the italics which have been inserted in the foregoing quotation that the Lord Chief Justice was speaking firstly of a *scheme* as mentioned in section 47 (8) of the 1932 Act where the expression means, by virtue of the definition in section 53 of the 1932 Act, " a scheme under this Act " (*i.e.*) a planning scheme made by a planning authority under powers contained in the 1932 Act, whereas the interim *order*, of which the Lord Chief Justice spoke secondly, was that made by the Leicester Corporation under section 5 of the 1943 Act—an order which is clearly not a scheme made under the 1932 Act and, accordingly, is not a " scheme " at all, as that expression is used in section 47 (8) of the 1932 Act. This being so, it is difficult to see why the restrictive limitations of section 47 (8) should be made to apply to it.

At p. 318 the Lord Chief Justice, referring to section 5 of the 1945 Act, states : " Where the local authority is getting out a scheme, they are not going to have, Parliament says, builders and owners of property developing their land contrary to the ideas contained in the scheme merely because the scheme has not yet been finally approved. The section accordingly enables the authority, where the development consists of any use of land or any building thereon, by order to prohibit

that use. That is what the local authority has purported to do in the present case. But since there is nothing in that section which affects section 47 of the Act of 1932 it follows that an interim scheme [*sic*] prepared by a local authority, which is an interim scheme under the Act of 1943, must not contain any provision prohibiting or controlling the erection or use of structures for the purpose of advertising". With the deepest respect one is bound to say that it is difficult to follow the Lord Chief Justice on this point. His Lordship uses the expression "an interim scheme" for the order (the "interim order" as he himself calls it earlier in his judgment) made by the Leicester Corporation, but it is clear that such order, whether it be termed "interim order" or "interim scheme", is certainly not a "scheme" under the 1932 Act, because it is not made under, and owes nothing to, the provisions of the 1932 Act. Thus, it is again difficult to see why the restrictive provisions set out in section 47 (8) of the 1932 Act should have any effect whatever upon the order, scheme, or whatever else it may be desired to call it, which is not "a scheme under this [the 1932] Act", to quote once more the definition in section 53 of the 1932 Act, but which is an order made under a different Act of Parliament, namely, the 1943 Act.

Henn-Collins, J., in the course of his judgment, observed at p. 320: "I think the fundamental question is whether the Act of 1943 has enlarged the ambit of schemes or the powers to make schemes in respect of advertisements beyond the provisions of the principal Act of 1932. The Act of 1943 provides by the interpretation section, section 14 (3), that any reference in that Act to the principal Act is to be construed as a reference to that Act as amended by the Act of 1943. There is no express amendment of the Act of 1932 in regard to advertisements and therefore *prima facie* when the Acts are to be read together, the governing Act is the principal Act". In this connection it may again be pointed out that section 5 of the 1943 Act necessarily leaves untouched the provisions of section 47 of the 1932 Act, if only by reason of the fact that the provisions of section 5 relate only to the interim period elapsing *before* a planning scheme comes into operation and not, as do the provisions of section 47, to development taking place *after* a scheme made under the 1932 Act has in fact come into operation. In other words, section 5 of the 1943 Act seeks to give control during a period of time which is left entirely untouched by section 47 of the 1932 Act. Accordingly, one would have submitted, had it not been for this new decision, that when a planning scheme came into operation the control over advertisements which had hitherto been available by section 5, would come to an end and be replaced by such control (if any) as was to be derived from the effect of such provisions as to advertisements as had been inserted in the operative scheme when taken in conjunction with the provisions of section 47 of the 1932 Act. It may well have been found that control over advertisements exercisable under the operative scheme was less effective, by virtue of the restrictive effect of section 47 (8) of the 1932 Act, than such control when exercised during the interim period by virtue of the unrestricted provisions of section 5 of the 1943 Act. If this were so it would, of course, not be the first time that, from the

point of view of a controlling authority, control during a period of interim development had been found better, because more flexible, than control under an operative planning scheme.

Furiously though the decision in *Mills and Rockleys, Ltd.* v. *Leicester Corporation* may give one to think, the effect of the decision is perfectly clear and that is that there is no more control over advertisements during a period of interim development than is permitted by section 47 of the 1932 Act. As the provisions of section 47 do not take effect until a planning scheme comes into operation it follows that there is, so far as the law of planning is concerned, no control at all over the indiscriminate exhibition of advertisements during the interim period before a planning scheme made under the 1932 Act comes into operation.

CAVEAT LESSOR ?

By E. O. Walford, LL.D.

It has generally been supposed that a lessee is *pro tanto* a purchaser and that the maxim " Caveat emptor " applies in relation to the interest which a lessee acquires in the property which is let to him.

In *Bottomley* v. *Bannister*, [1932] 1 K. B. 458, Scrutton, L.J., remarked that it was

> " well-established English law that in the absence of express contract a landlord of an unfurnished house is not liable to his tenant . . . for defects in the house or land rendering it dangerous or unfit for occupation even if he has constructed the defects himself, or is aware of their existence ".

In *Otto* v. *Bolton*, [1936] 1 A. E. R. 960, Atkinson, J., cited that passage, apparently with approval, and the further words of the same Lord Justice :

> " A purchaser of the freehold is, in my judgment, in no better position than a tenant. No case was cited to us in which a tenant or purchaser has ever recovered against a lessor or vendor, either by implied contract or in tort, by establishing the liability of the vendor or landlord for injuries sustained through the house or its fixtures being unsafe at the date of the sale or of the lease ".

Mr. Justice Atkinson observed that unless the law there laid down had clearly and plainly been declared to be wrong it was binding upon him. Turning to the case of *Donoghue* v. *Stevenson*, [1932] A. C. 584, his Lordship referred to " a significant passage at the bottom of page 597 in Lord Atkin's speech referring to *Cavalier* v. *Pope*, [1906] A. C. 428 ", Lord Atkin's remarks being as follows :

> " The wife of the tenant of a house let unfurnished sought to recover from the landlord damages for personal injuries arising from the non-repair of the house, on the ground that the landlord had contracted to repair the house. It was held that the well-known absence of any duty in respect of the letting [of] an

unfurnished house prevented her from relying on any cause of action for negligence ".

In view of the opinion expressed in a later part of this article it is right to observe that in the course of his comments upon *Donoghue* v. *Stevenson*, *supra*, in *Otto* v. *Bolton*, *supra*, Mr. Justice Atkinson indicated that in the case in which he was delivering judgment, the defect was not hidden or latent and that the question of impossibility of intermediate examination (which is of considerable importance in relation to the doctrine of *Donoghue* v. *Stevenson*) did not arise. I mention this point because Atkinson, J., left open the question whether the principle of *Donoghue* v. *Stevenson* applied to buildings sold by a man who has built them (meaning thereby a man who has sold a completed house after building it).

It seems fair to assume that if Atkinson, J., had considered that a landlord might be liable in nuisance, although not liable in negligence, in respect of the condition of premises let unfurnished he would have alluded to that fact as there is little doubt that a condition of nuisance existed in the house which was the subject of the action in *Otto* v. *Bolton*. However, as Atkinson, J., remarked, " A purchaser can make any examination he likes, either by himself or by somebody better qualified so to do. He can take it or leave it, but if he takes it he takes it as he finds it. It is perhaps the strongest example of the application of the maxim *caveat emptor* ".

The Lessee's Position

It is clear, then, that if a *purchaser* takes a property he takes it as he finds it. It would seem difficult to contend that a person who takes a lease for ninety-nine years at a premium of, say, £2,000 and a ground rent of £10 10s. 0d. is not a purchaser; but a person who takes a lease at a rack rent is not so obviously a purchaser. The authorities do not, however, suggest that any distinction is to be taken between such two types of lease. In *Davis* v. *Foots*, [1939] 4 A. E. R. 4, the Court of Appeal had under consideration a short tenancy at a full rent. MacKinnon, L.J., quoted the passage from the judgment of Scrutton, L.J., in *Bottomley* v. *Bannister*, *supra*, concerning the non-liability of a lessor of an unfurnished house for dangerous defects in the absence of express contract, and remarked that the landlords had let the house with a pipe from which gas could escape when gas was turned on.

> " That, of course, might be said to be a dangerous defect, but that being the principle which has been recognised over and over again, the defendants [the landlords] are not liable for that. It is the tenant's business when he takes possession of a house to discover and remedy any danger that exists ".

In *Davis* v. *Foots* the dangerous nature of the defect was demonstrated in a very sad way, for the result was that the male tenant was killed by gas poisoning and his wife (co-tenant) was rendered seriously ill. But as du Parcq, L.J., said, " If a landlord lets premises in a dangerous condition, and that is the only fact to be relied upon, without more, no liability rests upon the landlord [*sc.* to the tenant or other occupants of the premises] for the consequences of that dangerous condition.

I have ventured to interpolate the words within square brackets in the *dictum* of du Parcq, L.J., because the rule is perhaps more precisely stated in *Robbins* v. *Jones* (1863), 15 C. B. (N.S.) 221, at p. 240, where it is said that " a landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumble-down house, and the tenant's remedy is upon his contract, if any ". Lord Macnaghten considered in *Cavalier* v. *Pope*, [1906] A. C. 428, that the law laid down in the passage last quoted was " beyond question ".

Retention of Control.

It is perhaps convenient here to refer to certain cases in which the landlord has been held responsible in respect of injuries resulting from the faulty condition of a part of premises of which he has retained control. It is convenient to summarise these cases.

(1) In respect of common approaches to a building or part of a building the landlord is bound merely to take reasonable care to ensure that such approaches are kept in a safe condition. There is no absolute liability towards the tenant: *Dunster* v. *Hollis*, [1918] 2 K. B. 795. It is doubtful whether a similar duty is owed to visitors to blocks of flats. It has been considered that the lessor is only responsible to persons visiting the tenants of the various portions of the building if injury is sustained owing to some obstacle or defect in the nature of a " trap ", which would not be noticed by a reasonably observant person: *Lucy* v. *Bawden*, [1914] 2 K. B. 318; *Fairman* v. *Perpetual Investment Building Society*, [1923] A. C. 74. However, in *Haseldine* v. *C. A. Daw & Son, Ltd.*, [1941] 3 A. E. R. 156, Scott, L.J., considered that, notwithstanding the *Fairman Case*, a person visiting the tenant of a block of flats may in law be the invitee of the landlord. Goddard, L.J., was disposed to think that this view was correct; but he thought that the matter was settled by *Fairman's Case* and that only the House of Lords could properly hold that such visitors were invitees of the landlord. The point is, of course, that if persons visiting tenants of flats were the invitees of the landlord he would be under a duty to take reasonable care that such visitors were not injured owing to any defects of which he knew or ought to have known, and not merely for creating or permitting dangers in the nature of " traps ".

(2) Although the general rule is that a landlord, unlike a tenant, is not liable for an omission to comply with his covenant to repair, or for the consequences of that omission *vis-à-vis* the tenant, unless he has had notice of the want of repair, such notice is not necessary if the landlord retains possession or control of the portion of the building which he has undertaken to repair. *Makin* v. *Watkinson* (1870), L. R. 6 Exch. 25; *Tredway* v. *Machin* (1904), 91 L. T. 310;

Torrens v. *Walker*, [1906] 2 Ch. 166, are authorities which support the general rule. *Melles & Co.* v. *Holme*, [1918] 2 K. B. 100, and *Bishop* v. *Consolidated London Properties, Ltd.* (1933) 102 L. J. K. B. 257, illustrate the qualification above mentioned.

(3) Even if the landlord has not undertaken to repair, but has merely retained possession or "control" of a portion of a building (*e.g.*, the right to repair that portion), he may be liable to *third parties* if he fails to take all reasonable care to keep that portion in a safe condition and thus causes damage to adjoining property or personal injury to those in the vicinity: *Wringe* v. *Cohen*, [1940] 1 K. B. 229, [1939] 4 A. E. R. 241; *Wilchick* v. *Marks & Silverstone*, [1934] 2 K. B. 56; *Cunard* v. *Antifyre, Ltd.*, [1933] 1 K. B. 551.

In *Wringe* v. *Cohen*, *supra*, the claim was dealt with as one of nuisance. The *Cunard* v. *Antifyre* decision was subjected to certain criticism, but not overruled, in *Shirvell* v. *Hackwood Estates, Ltd.*, [1938] 2 K. B. 577. In the last-mentioned case Greer, L.J., remarked that if the *Cunard Case* were inconsistent with *Robbins* v. *Jones*, *supra*, and *Cavalier* v. *Pope*, *supra*, it was a wrong decision, but he did not think that it was inconsistent with those decisions. To the list of cases in which the liability of the landlord in respect of the fall of parts of buildings has been established we may add *Taylor* v. *Liverpool Corporation*, [1939] 3 A. E. R. 329, where the daughter of a tenant of part a building recovered damages in respect of an injury suffered owing to the fall of a defective chimney stack whilst she was in the yard of the building of which the tenant occupied part. Stable, J., held that the yard was not part of the premises let to the tenant, but held that even if the yard had been comprised within the letting the case of *Cunard* v. *Antifyre, Ltd.*, *supra*, enabled him to give judgment for the daughter. In so holding, Stable, J., treated as *obiter* the *dicta* of the majority of the Court of Appeal in *Shirvell* v. *Hackwood Estates, Ltd.*, *supra*. On rather similar facts, those *dicta* were that there could be no recovery by a servant of the tenant who was killed by the fall of a branch of a dead tree which had been overhanging the property, because the tenant took the property as it was, and the tenant's servant could be in no better position than the tenant. Those *dicta* are supported by good authority, but Stable, J., rejected them and purported to follow the *Cunard Case*, where the main roof and guttering had been held to be vested in the defendant the superior lessor. In the case with which Stable, J., was dealing (*Taylor* v. *Liverpool Corporation*, *supra*) the whole of the various portions of the building appear to have been let off by the defendant corporation, and it is not clear that there was that identity of principle which would justify the view that *Taylor's Case* was governed by the *Cunard* decision.

NUISANCE.

The rule is well established that the landlord is not normally liable to strangers for dangers which exist upon premises occupied *exclusively* by a tenant, and the landlord's immunity extends to those who by invitation of the tenant enter those premises: *Lane* v. *Cox*,

[1897] 1 Q. B. 415; *Bromley* v. *Mercer*, [1922] 2 K. B. 126. A landlord may, of course, alter his position by contract, but even so, that contract will not avail third parties who enter the premises. So far as they are concerned his contract with the tenant is *res inter alios acta* (see *Cavalier* v. *Pope*, *supra*; *Malone* v. *Laskey*, [1907] 2 K. B. 141; *Cameron* v. *Young*, [1908] A. C. 176).

However, few rules of law are free from exceptions, and it has been held that a landlord of premises which he lets to another is liable in nuisance if he creates or authorises the creation or continuance of the nuisance, or neglects to perform his obligations under the lease. In *Wringe* v. *Cohen*, *supra*, the Court of Appeal appear to have accepted the decision in *Payne* v. *Rogers* (1794), 2 H. Bl. 350, that although liability in nuisance normally rests upon the tenant as occupier, the landlord is liable to third parties who are injured in their persons or property by a nuisance existing upon the demised property if he has undertaken to keep it in repair, at any rate where such third parties are not upon the demised property themselves when such injury occurs. Similarly, it has been held that where an owner lets property which *to his knowledge* is in a dangerous condition and extracts no covenant from the tenant to repair the property, the owner will be liable to third parties who are injured in consequence of the collapse of the property. There is, however, no established rule that a landlord who lets property without knowledge (actual or implied) of the existence of a nuisance, and therefore does not extract from his tenant a covenant to abate the nuisance, is liable, either to his tenant or to a third party, if injury to person or property ensues from *a nuisance which is discovered after the grant of the tenancy*. I assume for the purposes of the foregoing proposition that the premises are not to be used for any specially dangerous purpose or for anything which the landlord knows is likely to cause damage (cf. *St. Anne's Well Brewery Co.* v. *Roberts* (1928), 140 L. T. 1).

Or is There?

Having italicised the passage which evokes the inquiry with which this part of the article is headed, and having referred to the cases which appear to be material when considering the question whether an owner who has let premises is responsible for a nuisance on the demised premises, we can usefully turn to the case of *Spicer* v. *Smee*, [1946] 1 A. E. R. 489. In that case Atkinson, J., was dealing with a nuisance caused by an independent contractor who had effected an electrical installation in a house and had guaranteed the work for three years against defective material and workmanship. The installation was unfortunately left by the contractor in a dangerous condition, a live wire having been insufficiently insulated. The owner, A, let the premises in that condition, and whilst they were so let a fire occurred, with the result that the plaintiff's adjoining premises and furniture were destroyed. There was no evidence that A had actual knowledge of the faulty condition of the electrical installation at the date when the premises were let. A did not retain possession of any part of the premises, but did reserve the right " to view the interior of the premises and to carry out any necessary works of repair ".

Atkinson, J., was satisfied that the state of the premises around a certain plug with a bare wire in contact with wet wood caused the escape of a dangerous thing, to wit, fire. His Lordship was also satisfied that A's tenant had warned her of the faulty condition of the plug. Clearly that warning must have come after the tenancy had commenced and therefore the question which arises is whether the owner, A, should have been held liable only if she knew or ought to have known of the nuisance *when she let the premises*. It is possible that his Lordship considered that A must have known of the fault in the installation, but he did not rest his judgment upon that view. Indeed, he observed that the owner could not be heard to say that she did not know; and that it was her duty to know. His Lordship applied the principle enunciated in *Bower* v. *Peate* (1878), 1 Q. B. D. 321, namely, that where a person causes to be done an act which will produce injurious consequences in the absence of precautionary measures, or at least special care, he is bound to ensure that such measures or care are taken, and cannot excuse himself by showing that he delegated the work to a reputable independent contractor. His Lordship acknowledged that such liability did not arise in respect of any latent defect; but it is clear that he did not consider that the defect in the switch was unobservable. It would be difficult to deny that the knowledge of an owner's servants or agents is to be deemed, in general, to be the knowledge of the owner in relation to nuisances (cf. *per* Fletcher Moulton, L.J., in *Barker* v. *Herbert*, [1911] 2 K. B., at p. 642); but it does not follow that this rule applies in respect of the knowledge of an independent contractor who has performed a technical operation. It may be recalled that in *Haseldine* v. *Daw*, [1941] 3 A. E. R., at p. 168, Scott, L.J., pointed out that a landlord does not profess as such to be an electrical engineer. "Having no technical skill, he cannot rely on his own judgment, and the duty of care towards his invitees requires him to obtain and follow good technical advice. . . . To hold him responsible for the misdeeds of his independent contractor would be to make him insure the safety of his lift. That duty can only arise out of contract" or, may one add, out out the doctrine of *Rylands* v. *Fletcher*, or of nuisance? However, the doctrine of *Rylands* v. *Fletcher* may be dismissed from consideration, for in *Rickards* v. *Lothian*, [1913] A. C. 263, it was laid down that the bringing of water into premises in pipes is not an unnatural, or shall we say abnormal, user of land, and in *Collingwood* v. *Home & Colonial Stores*, [1936] 1 A. E. R. 74; [1936] 3 A. E. R. 200, the same was said of electricity, the application of *Rylands* v. *Fletcher* being negatived.

It seems that Atkinson, J., did not rest his decision in *Spicer* v. *Smee* upon the doctrine of *Rylands* v. *Fletcher*, but so wide a field was covered by his judgment that it is a little difficult to specify the principle upon which his Lordship desired to rest his decision. He would appear to have placed some reliance upon the decision in *Bower* v. *Peate*, *supra*, although it would seem that the *dicta* of Scott, L.J., in *Haseldine* v. *Daw*, *supra*, and the decision in *Collingwood* v. *Home & Colonial Stores*, *supra*, might have been sufficient to justify the view that *Bower* v. *Peate* did not apply. It appears to be deducible from the *Collingwood Case* that the work of installing

electricity in a private house is not work which is so hazardous that a person installing it must personally see that the contractor takes special precautions, though no doubt he must employ a person whom he reasonably believes to be a competent electrical engineer. Atkinson, J., was satisfied that the doctrine of *Rylands* v. *Fletcher* did not apply to such work. Was not the result that the landlord was absolved from liability in respect of the negligence of the independent contractor? The essence of *Rylands* v. *Fletcher* was that the landowner was responsible for the negligence of his contractor. Is it to be said that the landlord had escaped from liability under the rule in *Rylands* v. *Fletcher* to guarantee the work of his contractor (on the ground that the operation was not of such a dangerous nature as to warrant the application of that rule), only to be caught in the net of *Bower* v. *Peate* on the ground that the operation *was* of such a dangerous nature that the landlord must guarantee the work of his contractor? The very words from the judgment of Cockburn, C.J., in *Bower* v. *Peate* (1 Q. B. D., at pp. 325, 326), quoted by Atkinson, J., in *Spicer's Case*, contain a passage which seems to answer that question in the negative. Speaking of the case where injurious consequences will result unless means are taken to prevent them, and of the omission to direct that the additional preventive work should be done, Cockburn, C.J., observed, in relation to such an omission, that the person ordering the work

> "is, therefore, not in the position of a man who has simply authorised and contracted for the execution of a work from which, if executed with due care, no injury can arise, and who is, therefore, not to be held responsible if, while the work is going on, injury arises from the negligence of the contractor or his servants".

If, as Atkinson, J., conceded, the work was not within the doctrine of *Rylands* v. *Fletcher*, would it not follow that the defendant was not to be held liable for the negligence of his contractor if the work did not involve any preventive or precautionary steps? Provided that the proper materials had been used in accordance with the specification in a normal and workmanlike manner, there was no reason for anticipating that any danger to the adjoining premises would arise from the installation of electricity in Spicer's house. The importance of this point lies in the fact that if *Bower* v. *Peate* is applicable to an electrical installation there would seem to be no reason why it should not apply to *all repairs to fixed property*, with the result that every man must be his own surveyor or architect or effect insurance cover to cover risks of this kind.

Though it seems difficult to dispute the opinion of Atkinson, J., as to what was laid down in *Wringe* v. *Cohen*, since he delivered the judgment of the Court of Appeal in that case, there would not, however, appear to be any confirmation in the report of the observation of Atkinson, J., in *Spicer* v. *Smee*, *supra*, that in *Wringe* v. *Cohen* it was held that there is a duty on a landlord who has *retained the right of repair* to prevent his premises from getting into such repair as to constitute a danger to his neighbours. It is, indeed, submitted that it is clear from the report that the judgment was based on the express assumption that the landlord was liable to effect repairs. In

Spicer v. *Smee* the landlord was not so liable, and the cases are not parallel. The normal rule is that the occupier is liable in respect of nuisances upon the demised premises even if the nuisance exists at the date when the tenancy commences (*Broder* v. *Saillard* (1876), 2 Ch. D. 692) unless the landlord has undertaken to effect the necessary work. Perhaps the most peculiar point in connection with *Spicer* v. *Smee* is that there is no mention in the judgment of the decisions touching the liability of a landlord in nuisance where he has not undertaken to repair. It may, therefore, be worth considering those decisions. The best-known of those decisions is, of course, *Todd* v. *Flight*, 9 C. B. (N.S.) 377. That case certainly does appear to justify the view that if the owner of premises lets them whilst they are, to his knowledge, in a dangerous condition, but takes no covenant from his tenant to repair them, then he is liable in nuisance if injury to adjoining property or to persons in the vicinity should result from that condition. There is, however, one difficulty to which we shall come later. The point which it is desired to make here is that if and so far as Atkinson, J., imputed to the landlord knowledge of the nuisance upon the ground that the landlord could have inspected the work and discovered the defect, it is submitted that such a ruling would impose upon landlords an obligation in excess of that which is warranted by earlier decisions. It is also submitted that the rule laid down in *Bower* v. *Peate*, *supra*, and similar cases, and which appears to be closely related to the doctrine of *Rylands* v. *Fletcher*, has no application to the installation or repair of ordinary domestic electrical apparatus. To repeat the *dictum* of Scott, L.J., in *Haseldine* v. *Dawes*, *supra*, a landlord does not profess to be an electrical engineer.

POLLOCK'S VIEW.

In *Wilchick* v. *Marks*, [1934] 2 K. B. 56, Lord Goddard (then Goddard, J.) doubted the correctness of Pollock's view, namely, that a landlord who had not agreed to repair was not liable for defects of repair happening during the tenancy even if he habitually looked to the repairs in fact. However, in the 14th edition of *Pollock on Torts*, at p. 342, the following statement occurs: "If a man lets a house with a nuisance on it, he as well as the lessee is answerable for the continuance of the nuisance if it is caused by the omission of repairs which as between himself and the tenant he is bound to do, but not otherwise". It may be said at once that the authorities cited do not appear to justify the words "but not otherwise". The authorities in question are *Pretty* v. *Blackmore* (1873), L. R. 8 C. P. 401, and *Gwinnell* v. *Eamer*, [1875] L. R. 10 C. P. 658. In *Gwinnell* v. *Eamer* Brett, L.J., referred to *Pretty* v. *Blackmore*, which he said was in point in every particular and that

> "the Court there held that where premises are demised, and there is no longer any obligation on the landlord to keep them in repair, *but that duty is cast upon the tenant*, a person who is injured by any want of repair of them has no remedy against the landlord".

But his Lordship proceeded:

> "If the landlord *at the time of the demise* knows of the defect

> and does nothing to cause it to be remedied he may be liable, too. But I doubt very much whether, *if the burthen of repair is cast upon the tenant*, the duty of the landlord does not altogether cease. Here the accident occurred [to a person on an adjacent footpath] after the demise. If, therefore, the plaintiff has any remedy at all it must be against the tenant and not the landlord ".

Denman and Lindley, L.JJ., concurred, and the former indicated that the test must be as in *Todd* v. *Flight*. But how far does *Todd* v. *Flight* go? In this connection the *dicta* of Scrutton, L.J., in *St. Anne's Well Brewery Co.* v. *Roberts* (1928), 140 L. T. 1, are valuable. He remarked that *Todd* v. *Flight* was

> " no authority for the proposition that if though the chimneys were in a defective condition the defendant [the landlord] did not know it and could not by reasonable care have known it, he would then be liable, though not the occupier, to the person subsequently damaged by the fall of the chimney ".

Scrutton, L.J., expressed the view that the landlord was under no liability unless it could be shown that *at the time when the landlord let the premises* he knew that there was a nuisance on the premises.

Another decision to which reference might well have been made in *Spicer* v. *Smee* is *Wilchick* v. *Marks*, *supra*. In that case Lord Goddard, as he now is, referred to the fact that there is " nothing wrong in letting unfurnished premises which are out of repair " and that in such cases neither the tenant nor any persons upon the demised premises have any remedy against the landlord in respect of the dangerous condition of the premises. His Lordship observed that there was no decision concerning the case in which (as in *Spicer* v. *Smee*) the landlord reserved the right to repair but did not do so (neither party being under any covenant to repair). He was of opinion that if in the *St. Anne's Well Brewery Case*, *supra*, it had been shown that the lessors had acquired knowledge of the nuisance *during the term*, it was clear that the Court would have held the lessors liable. It will, however, have been noted from the remarks above that Scrutton, L.J., suggested as the true test the question whether a lessor has knowledge " at the time of the letting ". Certainly *Todd* v. *Flight* does not deal with the case in which a nuisance arises or is first discovered during the term. However, Lord Goddard in *Wilchick's Case* laid down the rule that if the landlord reserved the right to repair, that reservation imposed upon him *vis-à-vis* third parties (not injured on the demised premises) the liability to remedy a nuisance when he came to know of it.

Of such a proposition it may be said that it goes even further than *Wringe* v. *Cohen*, *supra*, in which the Court of Appeal, following *Payne* v. *Rogers*, 2 H. Bl. 350, held that a landlord who was liable to keep premises in repair was liable in nuisance to a person whose adjoining property was damaged by the fall of the landlord's ruinous premises. *Payne* v. *Rogers* has already been criticised upon the ground that the rights of third parties should not in principle be determined by reference to the terms of a contract made between other parties. The unreasonableness of the rule will no doubt be displayed if a case should occur in which the plaintiff fails in his action against the tenant owing to his lack of knowledge of the fact that the landlord had covenanted to repair. And it will be appreciated that a plaintiff in an action for

nuisance is not entitled before commencing his action to require disclosure of the intended defendant's tenancy agreement, lease or other contracts. The rule laid down in *Payne* v. *Rogers* and approved in *Wringe* v. *Cohen* has been explained (though not justified) upon the ground that the result is to avoid circuity of action. It does not seem possible to explain Lord Goddard's view on that principle. There can be no question of circuity of action as between A and B if B has not covenanted with A to indemnify him. Moreover, in Lord Goddard's view although the landlord who had reserved the right to repair was liable in nuisance to a third party the occupying tenant was also liable.

Another case touching upon this point is *Heap* v. *Ind Coope and Allsopp, Ltd.*, [1940] 2 K. B. 476, in which the Court of Appeal held the landlords liable for an injury to a third party resulting from the faulty condition of an outside cellar flap on the ground that the landlords had reserved the right to effect repairs to the property, though they had not entered into a covenant to do so. The decision is a strange one, for the landlords had not in fact, as counsel for the defendants pointed out, reserved the right to do outside repairs at all. That right was reserved in respect of interior repairs in the event of the tenant failing to comply with his covenant to keep the interior of the property in repair. The avowed desire of MacKinnon, L.J., was to hold " somebody " responsible if the law allowed him to do so, because " in common sense and decency Mr. Heap ought to be able to recover against somebody ". In view of the unsatisfactory feature above mentioned and of the fact that this was a case of a nuisance on the highway it is doubtful if *Heap's Case* is of much value except as indicating that the Court of Appeal thought fit expressly to approve *Wilchick* v. *Marks* (as to the reservation of a right to repair saddling the landlord with liability in nuisance) as modified by *Wringe* v. *Cohen*, [1937] 4 A. E. R. 241, which lays it down that the absence of knowledge of observable or knowable want or probability of want of repair does not exempt from liability in nuisance.

If the decisions are added together it will be seen that in the opinion of the Court of Appeal :—

(1) If the landlord covenants with the tenant to repair, the party injured by a nuisance can sue only the landlord.

(2) If the landlord enters into no covenant to repair, but merely reserves the right to repair, such a party can sue either the landlord or the tenant *or both*.

Such a result seems strange and does not rest upon earlier decisions or upon sound principles of law, whatever the social or moral grounds of the rule may be.

Wringe v. *Cohen*, [1939] 4 A. E. R. 241, is a clear authority for the view that if a landlord who has undertaken to repair neglects to do so and a condition of nuisance arises and damage is caused thereby to neighbouring premises, the fact that he was not aware of the condition of the premises will not exempt him from liability unless the nuisance was caused by a latent defect or by a trespasser or act of God and the landlord has not permitted it to continue after learning of the nuisance.

Repair and New Work.

It does not seem to me to follow that the rule that a landlord is not allowed to plead that he was ignorant of *the result ensuing from the failure to keep premises in repair* (as laid down in *Wringe* v. *Cohen*, *supra*) applies in respect of new work which he causes to be carried out by an independent contractor, unless the work done falls within the rule in *Rylands* v. *Fletcher* (which was admittedly not applicable in *Spicer* v. *Smee*) or *Bower* v. *Peate*, *supra* (*a*). In *Tarry* v. *Ashton* (1876), 1 Q. B. D. 314, of which much was made in *Wringe* v. *Cohen*, *supra*, the lamp over the highway had *by neglect* ceased to be safe. In *Spicer* v. *Smee* no question of neglect of repair arose. The owner had merely installed, through an independent contractor, an installation which he reasonably believed to be, and which should have been (but for the independent contractor's default) perfectly safe. To place the landlord under absolute liability for the execution of new work which need not and should not cause a nuisance is, it is submitted, to make new law, unless the rule in *Rylands* v. *Fletcher* or *Bower* v. *Peate*, *supra*, is applicable to that particular type of work, and it is submitted further that neither of those rules is applicable. Suppose that I authorise a competent contractor to make an addition to a house in accordance with a sound specification; but, unknown to me, the contractor does not follow the specification, but erects it so badly that it shortly falls upon adjoining property and causes damage to that property. It is submitted that there is no difference between that case and one in which the act is done by a trespasser or, as it is sometimes put, " a stranger " or " a third party ". It must be shown that I have " continued " the nuisance by failing to remedy it after knowledge of its faulty condition is gleaned by me. In *Sedleigh-Denfield* v. *St. Joseph's Missions*, [1940] 3 A. E. R. 349, Lord Wright observed :

> " Though the rule has not been laid down by this House, it has, I think, been rightly established in the Court of Appeal that an occupier is not *prima facie* responsible for a nuisance created without his knowledge and consent. If he is to be liable, a further condition is necessary—namely, that he had knowledge, or means of knowledge, that he knew or should have known, of the nuisance in time to correct it and obviate its mischievous effects. The liability is not, at least in modern law, a strict or absolute liability ".

He added that the difficulty now being considered does not arise " if the defendant by himself, or those for whom he is responsible, has created the nuisance ". Whether independent contractors fall within the class of persons for whom the defendant is to be responsible Lord Wright does not say. Later Lord Wright approved the view of Farwell, L.J., in *Barker* v. *Herbert*, [1911] 2 K. B. 633, that " a landowner is not liable for a nuisance caused, not by his own action, but by something done by another person against his will ", unless he permits the nuisance to continue.

It seems difficult to understand on what basis a landowner who has taken care to employ a competent contractor to carry out new work

(*a*) As to *Bower* v. *Peate*, *supra*, see the later remarks in the text below. It is emphasised that there is no work carried out with tools or other equipment which is not likely to result in harm to person or property if precautions are not taken.

of a technical nature in a proper manner (as distinct from repairs to a property which has *already become dangerous*) can logically be held responsible for failing to supervise that work (*b*). Indeed, his interference would be more likely to be characterised as an ill-advised act constituting evidence of foolhardiness (which is merely an example of active negligence). Nor does it seem to me that there is any particular reason for affording to a landowner a *locus pœnitentiæ* in respect of a deliberate act of sabotage by an independent contractor immediately after he has finished his task, but none in respect of a deliberate act of sabotage, or of omission, contrary to his instructions, during the execution of that task. If the work falls within the doctrine in *Rylands* v. *Fletcher*, it must be acknowledged that this peculiar result ensues, but is there any reason why it should ensue in respect of the erection of a house or the execution of any normal work within a house, to which *Rylands* v. *Fletcher* does not apply? Again, is there any reason why *Bower* v. *Peate, supra*, should apply to such work? It is quite true that there are some judicial observations which suggest that works of a certain kind are of such a nature that damage to third parties must be expected if precautions are not taken; and in connection with works of that kind landowners employing independent contractors have been held liable on the ground that delegation of the work to independent contractors cannot relieve the landowner from liability. In other words the maxim "*Qui facit per alium facit per se*" has been applied as if the independent contractor were in fact under the control of the landowner. As Salmond pointed out in his work on Torts, where dangerous work is done by such a contractor in his own premises, the person employing him is not liable for any damage which results from the contractor's negligence. Yet, if the employer causes it to be done in his own property it is fictitiously assumed that he will exercise control over the contractor. The position is illogical, for everyone knows that it would generally be impossible for the property owner to determine *what* precautions the independent contractor ought to take, and that the independent contractor would refuse to submit to interference except by some other technical adviser, instructed by the property owner because of his own lack of knowledge, but for whose negligence the property owner would be liable. The view of Salmond, *Law of Torts* (6th ed., p. 125), was that the rule rested on no logical basis, and that there are few operations which are not capable of being sources of danger and mischief, and considered that the rule was an arbitrary one "based on special considerations of public policy" (*c*).

Collateral Negligence.

It has been recognised that there may be "collateral" negligence of the contractor, and that the landowner is not responsible under the doctrine in *Bower* v. *Peate, supra*, for that kind of negligence. It is, however, quite impossible to define collateral negligence;

(*b*) Cf. the remarks of Scott, L.J., in *Haseldine* v. *Daw, supra*; and if a landlord "does not profess to be an electrical engineer", why should any other landowner be held liable as if he were so professing?

(*c*) Salmond, though remarking upon the tendency of the Courts to extend the rule, classifies the cases under two heads only—(a) the interference with the right of support, and (b) the creation of dangers in a highway: Salmond on Torts, 6th ed., pp. 121, 122.

for the cases cannot be reconciled, and it is therefore useless to say much on that subject here. So far as any light can be shed on the subject the references to the leading, but conflicting, cases can be found in any of the leading textbooks. To say that collateral negligence is negligence having no direct connection with the work in hand, though occurring whilst that work is being done, is probably more misleading than useful; yet little more can be said.

Final Reflections.

It would be but poor recompense to those who have followed this article to this point to conclude it with the obvious remark that the state of the law concerning the liability of landlords in nuisance is unsatisfactory.

I mentioned above that there was one point which would require consideration later. In connection with the question whether a landlord is liable for a nuisance it does not seem to have been necessary for the Courts to consider the case in which the landlord has neither covenanted to repair nor reserved the right to enter for that purpose. There must be many cases in which that state of affairs exists, particularly in connection with weekly or other short periodic tenancies. Suppose that a letting is effected in those circumstances, and at the date when the property is let it is known or ought with due attention to the property to have been known by the landlord that a nuisance existed upon it. Unless the nuisance is a statutory one which imposes liability upon the owner or occupier at the option of the local authority (which, in the writer's experience, tends to select the landlord) it would seem that the rule that the landlord is liable (in respect of such nuisances in the circumstances mentioned in the last sentence) to third parties (though not to the tenant or his visitors), would place the landlord at the mercy of an unscrupulous tenant; for he would be liable to attack by third parties in respect of damage occasioned by the nuisance, but would have no right to remedy the nuisance. Unsatisfactory though the law may be, it is at least worth while to attempt to state the cases in which a landlord may be liable to third parties in respect of a nuisance existing upon the demised premises where he has taken no repairing covenant :—

(a) *Nuisance existing at the date of the letting.*

(i) If the landlord knows or ought to know that it exists he may be liable even though he has not reserved the right to remedy it or covenanted so to do, unless he has obtained a covenant by his tenant to remedy the nuisance. He will be liable if he has so reserved or covenanted.

(ii) Express authority to the tenant so to use the premises that the nuisance will necessarily be continued will render the landlord liable : *Harris* v. *James* (1876), 45 L. J. Q. B. 545; *secus,* if the authorised user need not occasion a continuance of the nuisance : *Rich* v. *Basterfield* (1847), 4 C. B. 783.

(iii) If the landlord neither knows nor ought to know of the nuisance at the date of the letting, he cannot be deemed to have authorised its continuance. Hence, it is sub-

mitted that in such a case unless he has covenanted to do repairs or works which would include the remedying of the nuisance in question he is under no liability in respect of any nuisance existing at the date of the letting. It may be held that he ought to have known of the nuisance owing to his failure to keep the property in repair : see *Wringe* v. *Cohen, supra.* Otherwise, it is submitted that if he does not know of the nuisance he is not liable even if he has reserved the right to enter to do works which would include those necessary to remedy the nuisance. And it is further submitted that this immunity from liability extends to the case in which the nuisance has arisen from the faulty execution by an apparently competent independent contractor who has carried out work to the demised premises which is not of the kind to which the doctrine of *Rylands* v. *Fletcher* applies. It may be that the doctrine of *Bower* v. *Peate, supra,* may render the landlord liable where that doctrine applies; but although the ambit or basis of that rule cannot be satisfactorily defined there is no sufficient ground for suggesting that it applies to ordinary works of construction of buildings or the making of additions, improvements or repairs thereto, or the installation of normal domestic or household equipment, fixtures, fittings or services (such as interior electric wiring or gas pipes, geysers, or other gas appliances, or water fittings or apparatus). The rule in *Bower* v. *Peate,* like all other rules for which no reasonable basis can be found, is suspect, and so far as liability in nuisance is concerned it would be salutary if it were ruled that *Bower* v. *Peate* was merely *Rylands* v. *Fletcher* in another guise, and was not applicable to normal building operations or other works referred to in the last preceding sentence unless some higher measure of duty arose by virtue of a statute or otherwise. To say that *Bower* v. *Peate* and similar decisions apply to work which would in the natural course of things cause injury to a neighbour unless special precautions are taken is of no practical assistance, for it is clear that there must be very few classes of work, whether of repair or construction, which are not likely to cause injury to anyone who is close at hand if special precautions are not taken. Moreover, the more technical and dangerous the operation the more foolhardy would be the conduct of an owner who attempted to dictate to the independent contractor as to the manner in which the work should be carried out.

(b) *Nuisance arising during the tenancy.*

(i) If the landlord has not extracted from the tenant a covenant which renders the tenant liable to remedy the nuisance, it is not clear that the landlord is liable to remedy the nuisance (even if he has reserved rights which would enable him to do so); and it is submitted that he ought not to be held so liable unless he has so covenanted as to

render himself liable to remedy the nuisance. The landlord cannot be deemed to have authorised the nuisance, and his reservation of the right to repair should not be regarded as imposing an obligation upon him, but only as a precautionary measure in case, for the preservation of his property, he wishes to effect work which the tenant does not carry out and is *ex hypothesi* under no duty to carry out. Nevertheless, unless and until *Wilchick* v. *Marks*, [1934] 2 K. B. 56 is overruled it may be cited as authority for the proposition that a landlord who reserves the right to repair and imposes no liability to repair upon his tenant is liable to third parties in respect of nuisances occurring upon the demised premises during the tenancy.

(ii) *Semble*: the landlord would be liable for authorising the nuisance if the letting is for the purpose of doing something in the nature of a nuisance or from which a nuisance will certainly or probably result: cf. *Harris* v. *James*, *supra*.

(iii) The landlord is liable in respect of any nuisance which arises during the tenancy in so far as it is due to a breach or non-performance by the landlord of his obligations under the lease which he has granted to the occupying tenant: *Wringe* v. *Cohen*, *supra*.

(iv) Subject to the preceding observations the remarks in (a) (iii) above appear to apply with equal force to nuisances occurring during the tenancy.

MEDICAL PARTNERSHIPS.

NOTES ON THE NATIONAL HEALTH SERVICE BILL AS AFFECTING MEDICAL PARTNERSHIPS.

By Oswald A. Hempson, and N. Leigh Taylor, Solicitors.

It was well said in the House of Commons, on the occasion of the third reading of the National Health Service Bill, that it is a skeleton only and that its ultimate form will depend on the regulations made by the Minister of Health in exercise of the powers given to him. It is, therefore, impossible at this stage to give any final answer to some of the many problems that arise when considering its effect on partnerships between medical practitioners. Indeed, it is not always possible yet to see clearly what these problems will be and what form they will take. The object of these notes, therefore, is to draw attention to the more obvious difficulties and to make suggestions as to the lines along which they may best be solved.

Medical partnerships may take a variety of forms, and in order to limit the scope of these notes, only partnerships on typical lines have been considered. This form has been taken to be that in which the partners bind themselves for their joint lives, subject to a right of

voluntary retirement reserved to each individual partner after a specified term of years, with provisions for compulsory retirement of an incapacitated partner and expulsion for misconduct; on the retirement, expulsion or death of a partner the other partners are either bound to buy his share or have an option to do so, the right being reserved, if this option is not exercised, to sell the share in the open market to a new partner; a partner who has retired or been expelled is under restraint against practising in competition with his former partners; the shares of the partners are specified as definite fractions of the total profits of the partnership, the junior partner usually commencing with a smaller share but having the right to increase his share to equality with the other partners at a specified time by the purchase of further shares. It has also been assumed that the partners in the firm under discussion are not, pending the publication of the terms of service, able to decide whether they intend to accept service under the Bill.

GENERAL OUTLINE OF PART IV OF THE BILL.

All those who accept service under the Bill as general medical practitioners after the "appointed day" (*a*) will be in contract with a statutory body to be known as the Executive Council for the area in which they practise. Private practice continues to be permissible to them, except that a practitioner may not accept fees from patients on his "State list" or the lists of his partners (*vide* the Government White Paper on the Bill, Cmd. 6761, para. 44).

The sale or purchase of the practice (including private practice) of practitioners accepting service as general practitioners under the Bill becomes an indictable offence by virtue of clauses 35 (1) and (2). In addition clause 35 contains various provisions aimed at preventing evasion of the general principle which demand the most careful scrutiny by all called on to advise clients as to its effect and which are considered in more detail later. For convenience clause 35 is reproduced in full on pp. 50–53, *infra*. In return for the loss of the capital value of their practices all medical practitioners whose names are on the appointed day entered on the list of those undertaking to provide general medical services under the Bill are by virtue of clause 36 to receive compensation, to be paid in a manner to be determined by regulations which have not yet been issued, but which must under clause 36 (3) (c) provide that, except in special circumstances, the compensation is not to be paid until the retirement or death of the practitioner concerned. No indication has yet been given of what may be considered "special circumstances".

On the question of the power of the Ministry of Health to "direct" doctors as to where they are to practise, the position is briefly as follows: Clause 34 gives every practitioner "engaged in medical practice (otherwise than as a paid assistant)" an absolute right (subject to disqualification provisions similar to those in the National Health Insurance Act) to join the service in the area in which he is practising on making application to that effect before the "appointed day". (It is to be noted in passing that this seems to leave a doubt as to the rights

(*a*) A date to be fixed by Order in Council but which is at present intended to be April 1, 1948.

of a salaried partner.) The clause then proceeds to set up a " Medical Practices Committee " (*b*) to determine applications other than those made as of right, and gives the Committee power to refuse an application to join the service in any particular area on the grounds that there are already sufficient doctors in that area but for no other reason, subject again to the disqualification provisions mentioned above. The Committee also has power to choose between two applicants for the same vacancy. There is no power in the Bill for the Committee, or the Minister, to direct any practitioner as to the area in which he will practise : the powers of " direction " are vested in the Committee and are negative only.

Effect on Existing Partnerships.

The first question which will arise in almost every medical partnership on the Bill coming into effect is whether or not the partnership is still effective at law. In many cases there will be grave difficulty in giving any firm answer. The Bill contains no " transitional provisions " and no specific clauses which give any assistance on this point; and accordingly every case falls to be dealt with on its merits in accordance with the general law. Space does not permit, even were it profitable, any detailed consideration of the possible application of the doctrine of frustration, but inasmuch as the expressed object of the vast majority of medical partnerships is merely " to carry on in partnership the practice of general medical practitioners ", it is submitted that in the absence of some unusual feature it will be difficult to argue that the objects of the partnership are impossible of fulfilment so as to frustrate the contract.

If this be accepted, there are many possibilities of hardship being caused to a partner by the changed circumstances created by the Bill, and it is therefore necessary to consider what other relief may be available to a partner in this position. In the absence of some special provision in the Articles of Partnership this can only be found in the jurisdiction of the Court under section 35 (f) of the Partnership Act, 1890, if it can be shown that the circumstances render it just and equitable that the partnership be dissolved. In many cases this will not provide what is required, for in the first place the Court can only dissolve the partnership, whereas the partner in question may be most anxious for the partnership to continue if the terms of the partnership deed can be modified. In the second place, such a remedy is expensive to invoke even if the partnership deed, as is usual, contains an arbitration clause. One alternative might be to change the partnership to one for a term only, expiring on the " appointed day ", which would leave all partners free to practise in opposition thereafter, or to reconstitute the partnership on such terms as they might then agree. This might be appropriate in a long-standing partnership where all partners are well established in the neighbourhood but would be far from welcome to a relatively newly-joined junior partner. Before suggesting another answer to this difficulty it is proposed to consider in more detail

(*b*) The Medical Practices Committee has a medical practitioner as chairman and eight members, of whom six are to be medical practitioners. Members are to be nominated by the Minister of Health after consultation with " such organisations as the Minister may recognise as representative of the medical profession ".

how the particular rights and obligations of the partners may be affected by the Bill.

RIGHTS ON DETERMINATION OF THE PARTNERSHIP.

The provisions of the Bill do not appear to affect such rights of voluntary or compulsory retirement or expulsion as may be contained in the Articles of Partnership, except that if the retiring or expelled partner has joined the Service it will be illegal to pay any purchase-money for his share. Since he will have become entitled to compensation for the loss of the right to sell his share this may not give rise to any hardship

If, however, he has not accepted service under the Bill the position is different, inasmuch as his goodwill is still apparently saleable. Accordingly, if the other partners are, as in so many cases, under obligation to buy his share and have themselves joined the National Health Service they will suffer serious hardship, since they cannot re-sell that share nor will they have received compensation in respect of it under the Bill.

It will be noted that the phrase used above was that the goodwill of a partner who has not joined the service is still "apparently saleable"; but this is not free from doubt. During the committee stage of the Bill in the House of Commons, Mr. Willink quoted an opinion obtained from leading counsel as follows: "The goodwill of the medical practice of a partnership is an asset of the partnership and cannot be split up into parts so as to constitute each part a separate goodwill of each member of the partnership. Hence, if one partner is, on the appointed day, entered on the list of medical practitioners undertaking to provide general medical services, it would appear to be unlawful subsequently for any of the other partners to sell . . . his share in the goodwill of the partnership practice". Since then, however, clause 35 (12) has been added to the Bill. While this would certainly prevent anyone who had sold a share in a partnership and was indicted for an offence under clause 35 making use in his defence of the argument that the goodwill was not his but belonged to the partnership, it is by no means clear that it negatives counsel's argument as quoted above. Whichever construction is correct, the situation which arises in these circumstances is obviously unsatisfactory, and one which the partners will no doubt wish to forestall.

RESTRAINTS ON PRACTICE.

Will the restraint against practice in competition normally imposed by the Articles of Partnership on a retired or expelled partner be enforceable at law after the Bill becomes effective? It is established law that covenants in restraint of trade are *prima facie* void as contrary to public policy, though this rule has been relaxed to the extent necessary to render contracts of partnership and of service possible without exposing a partner or a principal to unfair competition from his former partner or servant. The question therefore arises where public interest lies in any new circumstances? While the competition of a former partner or assistant will not in future affect the value of the other partner's or the principal's goodwill, it may still materially affect his

income; and the result therefore of any decision by the Courts that restraints on practice could not be enforced would certainly be to deter older members of the profession from taking younger men as junior partners or assistants. The Minister of Health has made it clear that the Government consider the continuation of partnerships and assistantships desirable, particularly in so far as they permit the young practitioner to engage in practice under the ægis of an older and more experienced man. It is submitted, therefore, that public interest is best served by the continued enforcement of these clauses.

The further question may arise whether there can be said to be any valuable consideration for these covenants, now that the partner giving them will not receive any purchase money for his share. It is submitted that the true consideration for these covenants is not the purchase money paid for the share on retirement or expulsion but the existence of the partnership as a whole, and that therefore there will still be valuable consideration.

In this connection the wording of clause 35 (6) may or may not be significant. Paragraph (a) seems to refer particularly to covenants of this nature, but this clause appears expressly to be excluded by the last proviso from applying to anything done in pursuance of a partnership agreement, unless on the true construction of this proviso the words "or in pursuance of a partnership agreement" refer to the acquisition of premises only. The meaning of the clause seems very obscure and it is hoped that it will be clarified in the House of Lords.

Notwithstanding what has been said above as to the general principles, many partnership deeds are so worded that the restraint on a partner who has retired or been expelled is in fact dependent on his share having been purchased by the other partners. In these cases if the partners wish that the restraint should continue to be operative after the Bill has come into effect, an amendment to the Articles of Partnership will be necessary; and, having regard to the difficulty of finding on the actual retirement of a partner any consideration effective in law to support this amendment (which would be tantamount to a new covenant), it is clearly desirable that this should be done before the eventuality actually arises.

Purchase of Partnership Assets.

It is usual, on the retirement or death of a partner, for his share in any partnership assets, *e.g.*, a stock of drugs and instruments, a central surgery, etc., to be acquired by those taking over his share. In this connection it is necessary to study clause 35 (4). There is nothing in this clause or elsewhere in the Bill which would invalidate an obligation on the continuing partners to take over a share in partnership assets, so long as the price paid therefor is appropriate and does not include any element for goodwill. It is therefore a matter for consideration by the partners whether this obligation should continue. There is, however, a curious anomaly between (a) and (b) of clause 35 (4). Under (4) (b) the right to buy from a retiring partner his share in the partnership assets is expressly reserved, as indicated above, but no such reservation is made under (a) so as to permit the sale of a share in such assets to a new partner. It may be that the

last words of clause 35 (6) (b) immediately before the proviso, namely, " unless it is shown that no part of the consideration was given in respect of the said goodwill or part thereof " cover this difficulty. (6), however, is merely an extension of clause 35 (4) (presumably inserted with a view to easing the burden of proof resting on the prosecution) and it does not seem at all certain that the saving in (6) (b) applies to the very explicit language of (4) (a). In any case, protection may be obtainable under clause 35 (10) as indicated below, but it is submitted that until this matter is clarified partners should be warned of the possible difficulty of being unable in the future to recover from any new partner the value of these assets. In practices where central surgeries or expensive X-ray and other plant are held this may be a matter of moment.

DETERMINATION OF THE PARTNERSHIP BEFORE THE " APPOINTED DAY."

The next question which arises is whether provision should be made to meet the possibility of the retirement, expulsion or death of a partner before the " appointed day ", having regard to the difficulty of arriving at the value of shares in medical practices in the absence of any guide as to the compensation receivable under section 36. Considerable assistance is given by clause 37, which provides that if a practitioner retires from practice or dies during the period between the passing of the Bill and the appointed day and the goodwill of his practice has not been sold, such practitioner or his estate is entitled to compensation as if he had on the appointed day joined the service. By virtue of clause 35 (12) the word " practice " in this clause includes a share of a partnership practice. The difficulty is to know exactly what is meant by the word " retires ", and whether it will cover the case of a man leaving one practice to go to another in a different part of the country, or a partner who is retired compulsorily from a partnership on the grounds of incapacity and who subsequently recovers and is able to resume practice elsewhere. These doubts can only be resolved by the publication of the regulations under the Bill. In the meantime many medical men will no doubt be glad to take advantage of this clause (assuming it is still in its present form when the Bill becomes law) by relieving each partner of his obligation to buy the share of a partner who retires or dies after the passing of the Bill, leaving such partner or his personal representatives free to claim their compensation. As an alternative, if it is desired to continue the principle of purchasing these shares, so as to ensure to the continuing or surviving partners the right to choose the successor of the retiring or deceased partner, it is suggested that an appropriate provision would be to substitute for the price for the share laid down in the Articles of Partnership a price to be fixed by arbitration as representing the market value of that share at the date of retirement or death, and to specify as arbitrator a medical transfer agent or other suitable person to be nominated (in default of agreement between the partners) by, for example, the Chairman of Council of the British Medical Association. A similar provision might also be adopted to provide for the case of the retirement or death of a partner before

the passing of the Bill into law, which, of course, is not provided for in any way in the Bill as it stands; and also the case of the retirement or death of a partner who has not joined the service (on the assumption that on the construction of clause 35 (12) his share remains saleable).

The Shares of the Partners.

On first reading clause 35 (4) (c) might seem to imply that after the appointed day the partners' shares in net profits must be substantially in proportion to their earnings, but this must be considered in light of two qualifications, namely, first the words in the sub-clause quoted "having regard to the circumstances at the time when the agreement was made", and secondly, the words added at the end of this sub-clause in Committee of the whole House immediately prior to the Third Reading, namely, from "and the said sale shall be deemed", to the end of the sub-clause. The effect of these qualifications seems to be that no offence can be committed under this sub-clause if the terms of pre-Act partnership deeds as to the division of profits are adhered to. It may, however, be helpful to point out that the rights given to junior partners of increasing their shares are usually drafted as rights of purchase, and on such purchases becoming illegal these rights will presumably lapse. This, it is suggested, is most unfair on junior partners. Under these clauses the senior partner agrees to a sacrifice of income in return for a capital payment: this capital payment is, as it were, incorporated in his compensation under the Bill, which will presumably be based on the share of the partnership to which he is entitled on the appointed day, and it is submitted, therefore, that the fair thing is for the senior partner, having become entitled to receive his capital compensation, to be willing to submit to the anticipated sacrifice of income and for the shares of the partners to be varied on the agreed dates, notwithstanding that the junior partner cannot purchase his additional share.

New Partnerships After the "Appointed Day".

Hitherto these notes have been written mainly from the point of view of the variations which may become necessary in the terms of partnerships existing at the coming into effect of the Bill. As has been seen, there are certain saving provisions which protect the members of these partnerships from some of the dangers inherent in the creation by clause 35 of a new criminal offence. New partnerships do not get the benefit of these savings, but in lieu a very large measure of protection is given by clauses 35 (9) and (10). These clauses make it possible to submit transactions affecting medical practices for certification by the Medical Practices Committee, and it is provided that such a certificate is an absolute defence to a person charged with the offence of selling the goodwill of his practice, unless it can be established that the certificate was obtained by misrepresentation or the suppression of material facts. (In any case, under clause 35 (11) a prosecution for an offence under clause 35 requires the consent of the director of Public Prosecutions.) It becomes necessary, therefore, to consider the probable attitude of the Medical Practices Committee, and for convenience this will also be done by reference to the normal form of medical partnerships as known to-day.

Clearly the first thing must be the omission from the partnership deed of all provisions for the purchase of shares, or any requirement contravening the specific provisions of clause 35 (1) (3) (4) (5) and (6). As regards the question of the retirement (voluntary or otherwise), expulsion or death of a partner, it has been pointed out that the provisions normally found in medical partnership deeds (including the restraint against practice in opposition by a retired partner) in general terms continue to be appropriate, and should be acceptable if the payment of purchase-money for shares in goodwill be omitted. Most of the other usual terms of partnership are unaffected by the Bill, and there therefore remains the question of the partners' shares. Will a scheme of partnership in which the junior partner starts with a small share and increases by stages to equality with the others be acceptable? It is submitted that it should. The White Paper on the Bill (Cmd. 6761) in paragraph 57 states that practitioners practising together from health centres will be encouraged to enter group partnerships on the basis of pooling their profits. It is to be assumed, therefore, that in such partnerships the principle of fixed shares (*i.e.*, shares representing definite fractions of the whole, not varying with the partners' individual earnings) will be accepted, and there seems to be no reason for any distinction in this respect between those who practise from health centres and those who do not. Moreover, the Report of the Spens Committee, which has been accepted by the Government, is based on the principle of the remuneration of practitioners increasing from the time they commence practice up to the age of "maximum earning capacity". These two together, it is submitted, lead logically to the scheme of partnership outlined above.

Partners' Houses.

The White Paper (Cmd. 6761) states: "A main feature of the personal practitioner services is to be the development of health centres". Clause 21 of the Bill places on the local health authority (the county or county borough council) the duty of providing and equipping health centres for, *inter alia*, the provision of general medical services, but the Bill does not appear to give the medical practitioner any enforceable right to require such facilities to be provided for him, nor, on the other hand, does it compel him to use a health centre if it is available. (Possibly the Regulations could do this, but the general tone of the Government's statements suggests that they intend to use "encouragement" rather than compulsion.) In any case, it appears to be recognised on all sides that the setting up of health centres is a great experiment and that no one can yet prophesy either the outcome of the experiment or the date at which the centres are likely to become available. For the time being, therefore, the surgeries from which the partnership practice is run—whether or not part of the partners' residence—continue to be of material value, and care should be taken to ensure that those clauses in the partnership deed which are designed to ensure security of tenure (*e.g.*, by granting the surviving partners the option to buy a deceased partner's house) are not, on the wording of the document, dependent on the purchase of the deceased partner's share, as indicated above in the case of restraining covenants.

Much more important, however, are the provisions of clause 35 (3).

This section makes it an offence for a medical practitioner or his personal representatives knowingly to sell or let premises which he has previously used for the purpose of a medical practice to another practitioner with a view to enabling that practitioner to use such premises for the same purpose, if the consideration on such sale or letting is substantially in excess of that which might reasonably have been expected if the premises had not previously been used for the purposes of a medical practice. The transaction is an unlawful one, and the question, therefore, arises whether it is void and whether in the future whenever on investigation of a title there appears to be a sale from one medical practitioner to another after the appointed day, a requisition on title should be made with a view to ensuring that the transaction was not void. The point is apparently a novel one, but it has a close similarity to that decided by Roxburgh, J., in *Victor Battery Co., Ltd.* v. *Curry's, Ltd. & Others* (1946), 174 L. T. R. 326, and the reasons given for the judgment in that case seem to suggest that a conveyance would not be void even though the making of it constituted an offence under clause 35.

In any case, however, wherever one doctor purchases house property from another it would appear desirable that the necessary evidence be placed with the title deeds with a view to answering such a requisition on resale of the property. The best evidence will, of course, be the certificate of the Medical Practices Committee under clause 35 (9).

What advice can be given to the parties to such a transaction as to the consideration which might " reasonably have been expected ", etc.? Must a valuation exclude all consideration of the particular suitability of the site for a medical practice, or the fact that the house may have been specially adapted for the purpose? The intentions of the Government would not, of course, bind the Court if a prosecution were instituted, but some comfort can be gained from the Minister of Health's remarks in committee (15th day's proceedings, column 183) : " I am advised that it would be perfectly proper to give more for a doctor's house because of the different physical structure of the house. If there is a surgery . . . it would be perfectly proper to pay more for the house because of those conveniences ".

Summary.

From these somewhat disconnected notes the following emerges. Little concrete advice can be given to partners in medical practices until the Regulations are published and their intentions as to joining the service known. In the meantime their partnership deed should be scrutinised and amended where desired in relation to :

(a) the right to restrain a retired or expelled partner against practice in competition;
(b) the right of the junior partner to increase his share;
(c) such provisions as there may be ensuring security of tenure of the consulting rooms, and
(d) the relief of the obligation to buy the share of a partner who leaves the partnership or dies after the passing of the Bill.

Finally, in view of the difficulty of construing many sections of the Bill and the impossibility of foreseeing the manifold difficulties which may arise in the future, the partners would be well advised to provide

themselves with a ready means of obtaining relief against hardship. A precedent clause incorporating one method of achieving this is attached.

The actual text of clause 35 of the National Health Service Bill as it stands at present is printed below :

" 35.—(1) Where the name of any medical practitioner is, on the appointed day or at any time thereafter, entered on any list of medical practitioners undertaking to provide general medical services, it shall be unlawful subsequently to sell the goodwill or any part of the goodwill of the medical practice of that medical practitioner :

" Provided that, where a medical practitioner, whose name has ceased to be entered on any such list as aforesaid, practises in the area of an Executive Council in whose list his name has never been entered, this subsection shall not render unlawful the sale of the goodwill or any part of the goodwill of his practice in that area.

" (2) Any person who sells or buys the goodwill or any part of the goodwill of a medical practice which it is unlawful to sell by virtue of the last foregoing subsection, shall be guilty of an offence and shall be liable on indictment to a fine not exceeding—

(a) such amount as will in the opinion of the court secure that he derives no benefit from the offence; and

(b) the further amount of five hundred pounds;

or to imprisonment for a term not exceeding three months, or to both such fine and such imprisonment.

" (3) Where any medical practitioner or the personal representative of any medical practitioner knowingly sells or lets premises previously used by that practitioner for the purposes of his practice to another medical practitioner, or in any other way disposes or procures the disposition of the premises, whether by a single transaction or a series of transactions, with a view to enabling another practitioner to use the premises for the purposes of his practice, and the consideration for the sale, letting or other disposition is substantially in excess of the consideration which might reasonably have been expected if the premises had not previously been used for the purposes of a medical practice, the sale, letting or other disposition of the premises shall be deemed for the purposes of this section to be a sale by the first medical practitioner or his personal representative of the goodwill or part of the goodwill of the practice of that practitioner to that other practitioner.

" Where a medical practitioner or his personal representative sells, lets, or disposes or procures the disposition of, any premises together with any other property, the court shall, for the purposes of this subsection, make such apportionment of the consideration as it thinks just.

" (4) Where in pursuance of any partnership agreement between medical practitioners—

(a) any valuable consideration, other than the performance of services in the partnership business, is given by a partner or proposed partner as consideration for his being taken into partnership;

(b) any valuable consideration is given to a partner, on or in contemplation of his retirement or of his acceptance of a reduced share of the partnership profits, or to the personal representative of a partner on his death, not being considera-

tion in respect of past services of that partner or of property of that partner which is transferred or made available to the other partners or any of them for fair consideration; or

(c) services are performed by any partner for a consideration substantially less than those services might reasonably have been expected to be worth having regard to the circumstances at the time when the agreement was made;

there shall be deemed for the purposes of this section to have been a sale of the goodwill or part of the goodwill of the practice of any partner to whom or to whose personal representative the consideration or any part thereof is given or, as the case may be, for whose benefit the services are performed, to the partner or each of the partners by or on whose behalf the consideration or any part thereof was given or, as the case may be, the partner who performed the services, and the said sale shall be deemed for the purposes of this section to have been effected—

(i) in a case to which paragraph (a) or paragraph (b) applies, at the time when the consideration was given or, if the consideration was not all given at the same time, at the time when the first part thereof was given; or

(ii) in a case to which paragraph (c) applies, at the time when the agreement was made.

" (5) Where any medical practitioner performs services as an assistant to another medical practitioner for a remuneration substantially less than those services might reasonably have been expected to be worth having regard to the circumstances at the time when the remuneration was fixed, and subsequently succeeds, whether as the result of a partnership agreement or otherwise, to the practice or any part of the practice of the second practitioner, there shall be deemed for the purposes of this section to have been a sale of goodwill or part of the goodwill of the said practice by the second practitioner to the first practitioner, unless it is shown that the said remuneration of the first practitioner was not fixed in contemplation of his succeeding to the said practice or any part thereof, and the said sale shall be deemed for the purposes of this section to have been effected at the time when the remuneration was fixed.

" (6) For the purposes of this section—

(a) if a medical practitioner or the personal representative of a medical practitioner agrees, for valuable consideration, to do or refrain from doing any act, or allow any act to be done, for the purpose of facilitating the succession of another medical practitioner to the practice or any part of the practice of the first practitioner, the transaction shall be deemed to be a sale of the goodwill or part of the goodwill of that practice by the first practitioner or his personal representative to the second practitioner;

(b) if any medical practitioner or any person acting on his behalf gives any valuable consideration to another medical practitioner or the personal representative of another medical practitioner, and the first medical practitioner succeeds or has succeeded, whether before or after the transaction aforesaid, to the practice or any part of the

practice of the second practitioner, the transaction shall be deemed to be a sale of the goodwill or part of the goodwill of the practice of the second practitioner by him or by his personal representative to the first practitioner, unless it is shown that no part of the consideration was given in respect of the said goodwill or part thereof :

" Provided that this subsection shall not apply to anything done in relation to the acquisition of premises for the purposes of a medical practice, or in pursuance of a partnership agreement or to the performance of services as an assistant to a medical practitioner.

" (7) In determining for the purposes of this section the consideration given in respect of any transaction, the court shall have regard to any other transaction appearing to the court to be associated with the first transaction, and shall estimate the total consideration given in respect of both or all the transactions and shall apportion it between those transactions in such manner as it thinks just.

" (8) Where any consideration is, with the knowledge and consent of a medical practitioner or his personal representative, given to any other person, and it appears to the court that the medical practitioner or, if he has died, his estate or some person beneficially interested in his estate derives a substantial benefit from the giving of the consideration, the consideration shall be deemed for the purposes of this section to have been given to the medical practitioner or his personal representative, as the case may be.

" (9) Any medical practitioner or the personal representative of any medical practitioner may apply to the Medical Practices Committee for their opinion as to whether a proposed transaction or series of transactions involves the sale of the goodwill or any part of the goodwill of a medical practice which it is unlawful to sell by virtue of this section, and the Committee shall consider any such application and, if they are satisfied that the transaction or series of transactions does not involve the giving of valuable consideration in respect of the goodwill or any part of the goodwill of such a medical practice, they shall issue to the applicant a certificate to that effect, which shall be in the prescribed form and shall set out all material circumstances disclosed to the Committee.

" (10) Where any person is charged with an offence under this section in respect of any transaction or series of transactions it shall be a defence to the charge to prove that the transaction or series of transactions was certified by the Medical Practices Committee under the last foregoing subsection, and any document purporting to be such a certificate shall be admissible in evidence and shall be deemed to be such a certificate unless the contrary is proved :

" Provided that, if it appears to the court that the applicant for any such certificate failed to disclose to the Committee all the material circumstances or made any misrepresentation with respect thereto, it may disregard the certificate and this subsection shall not apply thereto.

" (11) A prosecution for an offence under this section shall only be instituted by or with the consent of the Director of Public Prosecutions, and the Medical Practices Committee shall, at the request of the said Director, furnish him with a copy of any certificate issued by them

under subsection (10) of this section and with copies of any documents produced to them in connection with the application for that certificate.

" (12) For the purposes of this and the next two following sections, references to the goodwill of a medical practice shall, in relation to a medical practitioner practising in partnership, be construed as referring to his share of the goodwill of the partnership practice."

Clause for Incorporation in a Deed of Variation of Partnership between Medical Practitioners in light of the National Health Service Bill.

If as a result of the coming into effect of Part IV of the National Health Service Bill at present before Parliament or any Regulations thereunder it shall appear to either partner that the continuation of the partnership in accordance with the terms and conditions contained in the said Partnership Deed shall be impossible or impracticable or would cause hardship to him he shall be at liberty to require that (in default of agreement between the partners) there be referred to arbitration under the provisions in that behalf contained in the said Partnership Deed (save that the arbitrator shall failing agreement between the partners be nominated by the Chairman of Council for the time being of the British Medical Association) the following questions namely

(a) whether the partnership shall continue and

(b) if yea on what terms or

(c) if nay on what terms the same shall be dissolved

And the Arbitrator shall have power to award a dissolution of the partnership and/or such modification of the terms and conditions contained in the said Partnership Deed as he shall think just and equitable in all the circumstances but in making such Award he shall have due regard to the rights and obligations of the respective partners immediately before the coming into effect of Part IV of the said Bill.

NOTES OF RECENT CASES.

1. *LAW OF PROPERTY.*

Contract for sale—" date of completion ".—Killner v. *France,* [1946] 2 A. E. R. 83, raised the question of the meaning of the " date fixed for completion " in an acute form. A property was agreed to be purchased with a clause that, if destroyed before the date of completion by enemy action, the contract could be rescinded. The purchase was fixed for November 27, 1944. Prior to that date the purchaser paid the purchase money to stakeholders and was allowed to go into possession of part of the premises pending the investigation of title and execution of conveyance. Two days before the date fixed by the contract for completion, *i.e.,* November 27, 1944, the premises were destroyed. Stable, J., held that the purchaser could recover his purchase money and rescind the contract. The learned Judge adopted the expression of Turner, V.-C., in *Lewis* v. *South Wales Ry.* (10 Hare, at p. 119) that completion of the purchase

meant " the complete conveyance of the estate and final settlement of the business ".

It should be noted that in this case there were really two points: (1) the contract had not been completed by conveyance, and (2) the date actually fixed for completion by the contract had not passed. The learned Judge was careful to avoid any opinion on the effect of completing prior to the date fixed. We think that, perhaps, similar difficulty *might* be experienced if the date had passed, but owing to the vendor's delay the purchase had not been completed.

(1 K. & E., p. 329, n. (*l*).)

Covenants relating to freehold—water—arbitration clause—rights of assignee.—Shayler v. *Woolf* (noted *ante*, vol. 10, p. 221) is now reported on appeal: [1946] 2 A. E. R. 54. The Court of Appeal affirmed the decision of Roxburgh, J., but the Court did not consider the question of the benefit running with the freehold. The Court held that the covenant to supply water in the conveyance was assignable and had been assigned, and so the assignee could enforce it against the covenantor. The decision is also noteworthy for the fact that it was repeatedly laid down by the learned Lords Justices that the benefit of an arbitration clause can in certain circumstances be assigned, and that it is not as such an unassignable contract. Otherwise, the case as decided in the Court of Appeal turns very largely on its facts. It is to be observed that the original pump and well had been changed for the convenience of the covenantor, and it was held that this did not affect the obligation to supply water, because the original well *could* have been kept in repair.

Public highways—dedication under the Rights of Way Act, 1932—*forty years' user anterior to the Act.—Att.-Gen.* v. *Dyer,* [1946] 2 A. E. R. 252, has a very short point. A way had been used as a public right of way without obstruction for over forty years, but obstruction had begun before the Act came into operation. Evershed, J., held that the Act did not require that the forty years' unobstructed user should be continued until after the date of the Act, and that dedication had been established. The opinion of the learned Judge was based on the words of the Act itself and upon the view that it was a " procedural " Act. The Act was procedural because it was not designed to create new rights or new causes of action, but to simplify making good claims of a well-established kind. Because the Act was procedural the ordinary rule against retrospective effect did not apply. We may observe that a highway once dedicated cannot be abandoned like an ordinary right of way: *Dawes* v. *Hawkins,* 8 C. B. (N.S.) 848. It would appear that if the Act is retrospective it may have the effect in practice of reviving some obsolete ways.

Highways—nuisance.—A case of general interest to property lawyers though lying in tort is *Dwyer* v. *Mansfield,* [1946] 2 A. E. R. 247, where action was brought against a greengrocer by a jeweller and dealer in waterproof goods respectively for nuisance arising from queues to buy potatoes or soft fruit. The case was based on the well-known cases of pit queues that obstructed entrance to shops, and it is particularly

interesting that Atkinson, J., seemed reluctant to follow the cases, though, in fact, he distinguished them. The plaintiffs lost, partly because the learned Judge held that he was not satisfied on the evidence that the queue constituted a nuisance or caused damage to the plaintiff, but also because the defendant was not responsible for causing the queue. He had done nothing unreasonable or unnecessary. In effect, the queue was not caused by the act of the greengrocer because he did what was reasonable in pursuance of his licence to sell fruit and vegetables.

The learned Judge distinguished the theatre cases (*Barber* v. *Penley,* [1893] 2 Ch. 447; *Lyons* v. *Gulliver,* [1914] 1 Ch. 631) on the ground that there the defendants had done something to invite a queue and, it was suggested, that something could have been done to avoid a queue. The learned Judge adopted the words of Park, J., in *R.* v. *Carlile,* 6 C. & P., at p. 649, to the effect that if what the shopkeeper did was necessary for *bona fide* carrying on his trade the law would protect him if he did not take up more time than was necessary in doing it.

Incomplete gift—death of donor prior to Treasury licence.—It is a well-known and not a very convenient rule that there is no equity to complete an imperfect gift: *Milroy* v. *Lord,* 4 De G. F. & J. 264. The rules is sometimes stated by saying that the donor must do all that is necessary to be done to transfer the property to the donee: cf. Warrington, L.J., in *Re Williams,* [1917] 1 Ch., at p. 8. It has been expressed as requiring only that which it is his duty to do to divest himself of his interest in the property, though something remains to be done to complete the title of the donee: cf. *Holt* v. *Heatherfield,* [1942] 2 K. B. 1. *Re Fry,* [1946] 2 A. E. R. 106, leans towards the first statement because a gift failed on the ground that though the grantor had executed the necessary transfer of shares he was still awaiting Treasury sanction at the date of his death to complete the transaction.

The way of the giver is indeed hard, but the moral is, that where any doubt exists a codicil to a will may be effective.

Hire-purchase—termination of agreement—title of third parties—lien for repairs.—The frequency of hire-purchase agreements still does not develop the law to give adequate protection to third parties. In *Bowmaker, Ltd.* v. *Wycombe Motors, Ltd.,* [1942] 2 A. E. R. 113, the hire-purchase agreement was determined by appropriate written notice, but before the car was retaken the borrower had an accident and left the car to be repaired in a garage. The garage proprietors were held to have no lien for the cost of doing the repairs, because they had received the car from a person who had no title to it. This was a decision of a Divisional Court on an interpleader and the earlier authorities were discussed. As was pointed out, normally a lien for repairs will arise, because the borrower, under agreement, has an express or implied authority to get the car repaired when necessary to keep it in condition. An agreement between the parties to a hire-purchase agreement that the borrower should not create a lien was ineffective as against third parties. In the instant case, however, as the agreement was already terminated, the borrower had no right to use the car or get it repaired, and the express or implied authority was determined.

Nuisance—mound against adjacent wall—liability of owner and occupier.—In *Maberley* v. *Peabody and Others,* [1946] 2 A. E. R. 192, Stable, J., held that a mound of earth piled up against one side of a wall and thereby causing it to bulge was a nuisance, as was also the infiltration of deleterious liquid that might loosen the bricks. In the absence of any substantial damage an injunction in the nature of a mandatory injunction (its actual form was not settled) would issue. It was not possible to assess the pecuniary loss that might be suffered if it continued, and it could not be said that the injury to the plaintiff's legal rights was small. The occupiers at the date of action had not created the mound, nor had they added to it, but they were liable because they had not removed it. The freeholder was liable for creating or authorising it.

There does not seem anything new in this case, but it is worth attention for its scope and effectiveness.

Planning—Housing Act—park, garden or pleasure ground.—Under the Housing Act, 1936, s. 75, the Minister cannot authorise the compulsory acquisition of land which is "a park, garden or pleasure ground, or is otherwise required for the amenity or convenience of any house". In *R.* v. *Minister of Health,* [1946] 2 A. E. R. 189, a Divisional Court held that this did not include a sports ground, because the exception only applied where the pleasure ground was enjoyed in connection with a house. In other words, the section was directed to prevent severance of house and grounds by compulsory acquisition of part.

Power—exercise with power of revocation—subsequent release of power.—In *Re Chatterton's Settlement,* [1946] 2 A. E. R. 211, Wynn-Parry, J., decided that on the construction of the deed of release of a power of appointment it operated to revoke a prior revocable exercise of the power over the whole fund. The reasoning of the learned Judge was to the effect that the deed of release expressed a desire, and in pursuance of the desire did release her power over the fund; that no release of the power could be operative without the earlier exercise of the power being swept away, since otherwise there was no power to release; but further, the release also declared that the fund should be enjoyed by the persons entitled in default of appointment, which would not be possible under the exercise of the power. The decision is one purely on construction, but is interesting as an example of an implied revocation of the exercise of a power of appointment.

Sale by receiver for debenture-holders—Courts (Emergency Powers) Act.—In *Re Northern Garage, Ltd.,* [1946] 1 A. E. R. 566, Vaisey, J., held that a receiver for debenture-holders appointed by a debenture-holder with leave of the Court under the Courts (Emergency Powers) Act does not need leave to sell property subject to the charge. This had been held in *Re Wood's Application,* [1941] Ch. 112 (noted *ante,* vol. 5, p. 218), but in this case the company was in liquidation at the time of the appointment. Vaisey, J., held that the liquidation did not affect the validity of the power to appoint a receiver, and that the order of the Court operated to make that appointment valid according to the tenor of the debenture,

namely, as agent for the company. He also accepted the proposition, which does not appear to have been argued, that an assignment subject to the charge required the concurrence of the company by its liquidator.

(1 K. & E., p. 798.)

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2. *CHARITIES.*

"Work in the parish"—"benevolent work"—evidence—vicar as corporation sole.—Ecclesiastical charities have presented a problem, because all the work of an incumbent does not necessarily fall within legal charity, but a gift to an incumbent for the time being is apparently deemed to be for the advancement of religion: *Re Garrard,* [1907] 1 Ch. 382. There are, therefore, three problems: first, whether there is a gift to an incumbent as such, which will enure for the benefit of his successor; secondly, whether the gift is to be used by the person to whom it is given personally only for charitable purposes; and thirdly, if given to an incumbent as such, whether either he or his successors may employ it only for charitable purposes. All these points appear to have arisen in *Re Simpson's Estate,* [1946] 2 A. E. R. 220. The gifts were as follows:—

(a) "to the vicar of St. George's Church £1,000 to be used for the benefit of his church";
(b) "unto the Rev. S. G. Tinley, St. Luke's Vicarage, Victoria Docks, £500 for his work";
(c) a gift of £500 to Rev. S. L. Saul of St. Matthew's Rectory, Bethnal Green, "for his benevolent work";
(d) residue "to the Vicar of St. Luke's Church, Ramsgate, to be used for his work in the parish".

There was also a gift of clothes to the Rev. S. G. Tinley "for his benevolent work in that parish".

An affidavit was filed exhibiting the annual report of the parish of St. Luke's, Victoria Docks, showing the sort of work done there.

There was also an affidavit by the Rev. S. L. Saul, setting out that he had ceased to be rector of the parish but continued to do much work in the Rural Deanery, as well as being a Prebendary of St. Paul's. This affidavit set out a somewhat multifarious round of activities. Romer, J., held that (b) was a valid charitable trust, and so also was (d), but that (c) was not valid because it was not shown that the sum would not be used for benevolent objects not legally charitable.

In both cases the affidavits were admitted to evidence on the ground that the expression "work" in the context was capable of ambiguity. In effect, therefore, the decision in *Farley* v. *Westminster Bank,* [1939] A. C. 430, that a gift to vicar and churchwardens for parish work must be taken in its context, and that in so far as it involves any principle other than this, it operates only to the effect that learned Law Lords were aware that some parochial activities are not necessarily for the advancement of religion and so charitable. On the other hand, in any later document it is competent to show that the work of the parish contemplated is that limited to those functions of the incumbent which are for the advancement of religion (cf. *Re Rees,* [1920] 2 Ch. 59), or else are now specifically devoted to other charitable objects, such as the relief of poverty, which appears to have been the ground on which the gift under clause (b) would be most adequately supported in the light of the other evidence.

In our view, draftsmen of these general gifts to charity or intended

charity should always limit them by specific reference to charity. So, if the gift had been made to the Vicar of St. Luke's, Ramsgate, to be used for his *charitable* work in the parish no difficulty could arise as to the validity of the gift and little in its administration.

If it is not intended to impose restrictions this should be made equally clear. "To the Vicar of St. Luke's Vicarage, Ramsgate, for his own use and not so as to create in favour of any other person", or some words of desire expressly excluding a trust.

Actually, this case had one other interesting point, because the vicarage of St. Luke's was vacant at the date of the testatrix's death. Romer, J., held that it was a gift to the corporation sole and was payable to the vicar for the time being when appointed.

(2 K. & E., 299; Tudor, p. 33.)

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3. *WILL CASES.*

By J. H. C. MORRIS, B.C.L., of Gray's Inn, Barrister-at-Law.

Position of signature—Wills Act Amendment Act, 1852.—Section 9 of the Wills Act, 1837, provided that a will must be signed by the testator "at the foot or end thereof"; but this provision caused so many wills to fail for want of due execution that in 1852 the Wills Act Amendment Act provided that the will should be valid if the signature should be so placed at or after or following or under or beside or opposite to the end of the will that it should be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will. A large number of cases have been reported on the construction of this statute, of which the most recent is *Re Hornby* (1946), 62 T. L. R. 348. The testator wrote his will in his own handwriting on one side of a sheet of paper. His signature appeared in an oblong space about a third of the way down on the right-hand side, in the middle of the residuary gift. The signature of the witnesses appeared at the bottom of the sheet. Both of the witnesses were dead. The words of the will and the outline of the oblong were in green ink and the signature of the testator and that of the witnesses was in ink of a different colour. Wallington, J., came to the conclusion that the testator signed the document where he did with the intention of giving effect to it as his will, and admitted it to probate.

(Theobald 25.)

Hotchpot clause—whether forgiveness of debt.—In *Re Horn* (1946), 62 T. L. R. 408, the question was whether a hotchpot clause operated to release one of the testator's sons from a debt which he owed to the testator. The testator gave legacies of £45,000 to each of his two sons, gave his residue to his four children in equal shares, and by clause 15 provided that all money which he had lent to any child and the interest thereon should be taken in or towards satisfaction of the share of such child in the residuary estate and should be brought into hotchpot and accounted for accordingly. The testator had lent one of his sons—Geoffrey—£13,000 carrying interest at 5 per cent. There was only enough estate to satisfy half the legacies and there was no residue. It was contended by Geoffrey that clause 15 operated to release the debt notwithstanding that there was no residue, largely on the strength of certain *dicta* of the Court of Appeal in *Re Cosier,* [1897] 1 Ch. 325. But in the instant

case the Court of Appeal was fortunately able to avoid so inequitable a result—which plainly could not have been contemplated by the testator. They pointed out that the *dicta* in the earlier case were not concurred in by the House of Lords when the case reached that House on appeal: *Wheeler* v. *Humphreys,* [1898] A. C. 506. A hotchpot clause is a charging clause and not (in the absence of exceptional circumstances) a discharging clause. The testator could easily have forgiven Geoffrey's debt in appropriate language, and it was plain that when he wrote clause 15 of his will he did not intend to do so.

(Theobald 657.)

Soldier's will—exercise of special power of appointment over personalty.—Can an unattested soldier's will, admitted to probate under section 11 of the Wills Act, 1837, exercise a special power of appointment over personalty? In *Re Earl of Chichester's Will Trusts,* [1946] 1 A. E. R. 722, Evershed, J., decided that it could. The matter was formerly in some doubt because section 11 provides that "any soldier on actual military service may dispose of *his* personal estate as he might have done before the making of this Act". In *Re Wernher,* [1918] 2 Ch. 82, the Court of Appeal held that a soldier's will could exercise a general power of appointment, there being for this purpose no sufficient distinction between a man's own personal property and personal property over which he has a general power of appointment. Although the decision clearly did not cover a special power, Evershed, J., considered that the language of the Court of Appeal, taken as a whole, was wide enough to cover special powers, and therefore had no difficulty in extending the principle of the earlier decision. As the learned Judge was of opinion that section 3 of the Wills (Soldiers and Sailors) Act, 1918, clearly makes a soldier's will capable of exercising a special power of appointment over realty, he was able to avoid creating a tiresome and inelegant distinction between realty and personalty.

(Theobald 49.)

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4. *LANDLORD AND TENANT CASES.*

By Lionel A. Blundell, LL.M., Barrister-at-Law.

Law of Property Act, 1925, *s.* 40—*oral agreement for tenancy relied on by plaintiff who has been ejected and sues for trespass.*—In *Delaney* v. *Smith* (1946), 62 T. L. R. 398, the Court of Appeal had to consider an unusual kind of problem, involving reference to the old forms of pleading.

The plaintiff had an oral agreement with the defendants for a tenancy of a house to commence at a future date. Before that date, the defendants changed their mind and informed the plaintiff they could not let the house to him. The plaintiff gained entry and took possession, but the defendants forcibly ejected him. He thereupon sued for trespass, but the defendants pleaded section 40 of the Law of Property Act, 1925, there being no note or memorandum in writing and no part performance by them. The County Court Judge gave judgment for the plaintiff on the ground that he relied on the oral agreement, not as a cause of action, but to defeat the plea that the trespass was justified.

The Court of Appeal reversed this decision, holding that the plaintiff, in an action against the freeholder for trespass, must rely on the tenancy

agreement as an essential part of his cause of action, and that therefore the terms of section 40 needed to be complied with. The reasoning of the Court of Appeal can perhaps be seen most clearly from a passage in the judgment of Wynn-Parry, J.: "By the old form of pleading the count, in such an action as this, would have taken some such form as: 'That the defendant broke and entered certain land of the plaintiff . . . ': see *Bullen and Leake's Precedents* (3rd ed., p. 415), and compare the count in *Browne* v. *Dawson* (1840), 12 Ad. & El. 624, which was 'trespass for breaking and entering a certain room or apartment of the plaintiff, called the school-room'. To the above count the plea of the defendant would have been a plea of *liberum tenementum,* 'that at the time of the alleged trespass the said land was the freehold of the defendant': *Bullen and Leake* (p. 802). The plea of *liberum tenementum* was construed as admitting the actual possession of the plaintiff, but as containing by implication an assertion of a right of possession in the defendant as owner of the freehold. By way of replication to a plea of *liberum tenementum* the plaintiff might plead a demise from the defendant to the plaintiff, see *Bullen and Leake* (p. 803). By the modern form of pleading a plaintiff met with the defence that the land in question was the freehold of the defendant can raise a corresponding plea by way of reply. It is clear on the facts in this case as found by the Judge that, if the pleadings had proceeded strictly (a hypothesis which must be assumed for the purpose of testing the matter), the plaintiff would have been compelled to plead the oral agreement for a tenancy by the appropriate proceeding analogous to a reply in the High Court, because he was not in a position to deny the defendant company's title."

The learned Judge went on to observe that the plea of *liberum tenementum,* and the corresponding modern defence that the land was the freehold of the defendant, involve a confession and avoidance. The plea admits the possession of the plaintiff, but asserts a title to the freehold. "By this anomalous plea the plaintiff is put to show how he has a possession in himself consistent with the freehold being in another, unless he chooses to traverse the title set up by the plea": *per* Cresswell, J., in *Roberts* v. *Tayler* (1845), 1 C. B. 117, at p. 126. Where the plaintiff in reply admits the title of the defendant, but pleads a demise from him, there again is a true confession and avoidance. The onus is then on the plaintiff to prove a demise from the defendant, and it has become an essential part of his case to do so. Thus he has been forced by the course which the pleadings have taken into bringing an action on a contract for the disposition of an interest in land, and must meet the requirements of section 40 of the Law of Property Act, 1925. The same result follows if the plaintiff in his reply denies the defendant's title but, as an alternative, pleads a demise from him.

(Woodfall, 24th ed., p. 145 *et seq.*; Bullen and Leake, 9th ed., pp. 513, 964.)

Notice to quit—four-weekly tenancy—notice given by agent.—The recent case of *Lemon* v. *Lardeur,* [1946] W. N. 140, in the Court of Appeal, confirms two rules as to notices to quit which have been generally accepted for some time now. The first is, that a notice to determine a periodic tenancy must expire at the end of a current period of the tenancy (in this case it was a four-weekly tenancy). The other rule is, that although a general agent having the entire control and management of the property may give a notice to quit in his own name, there must be proof of such general agency by evidence. In this case the notice to quit was

given by the landlord's husband, and there was no evidence of a general agency. When a notice to quit is given by a particular agent, having a limited authority only, such notice should be given in the name of the principal, or expressly on his behalf.

On the first point, *Queen's Club Gardens Estates* v. *Bicknell,* [1924] 1 K. B. 117, and *Precious* v. *Reedie,* [1924] 2 K. B. 149, were approved; on the second point, the Court of Appeal has reaffirmed the proposition laid down in *Jones* v. *Phipps* (1868), L. R. 3 Q. B. 567.

(Woodfall, 24th ed., pp. 959, 964.)

Rent Restrictions Acts—executor actually resident in house entitled to protection of the Acts.—In *Lawrence* v. *Hartwell* (1946), 62 T. L. R. 491, the contractual tenant died leaving the defendant, who had been resident in the house with the deceased for less than six months before her death, her sole executrix and sole beneficiary. Subsequently the landlord served notice to quit on the defendant, and the defendant claimed protection under the Rent Restrictions Acts.

It was held by the Court of Appeal that as the deceased's contractual interest in the house vested solely in the defendant on the death of the contractual tenant, she became in her capacity as testatrix a person "deriving title under the original tenant" within the meaning of section 12 (1) (f) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. She was therefore a tenant herself for the purposes of the Acts, and as she was also genuinely occupying the house as her home she was entitled to the protection of the Acts.

It will be observed that in this case the testatrix-occupier was also sole beneficiary under the will, but it appears from the judgment of Morton, L.J., in which Somervell, L.J., and Asquith, L.J., concurred, that this additional fact was unnecessary to the decision, for he states as his opinion the proposition that an executor who has proved the will, who has not assented to a bequest to someone else, and who is in actual occupation of the house at the termination of the common law tenancy, is entitled to the protection of the Acts.

(Rent Restrictions Guide, 2nd ed., p. 66.)

Rent Restrictions Acts—lettings with attendance or use of furniture—whether rent fairly attributable to the attendance or use of furniture forms a "substantial portion" of the whole rent.—In *Palser* v. *Grinling,* reported in 175 L. T. 204 and also in [1946] W. N. 167, the Court of Appeal has laid down a clear code of rules for dealing with lettings with attendance or the use of furniture, which will do much to clear up the doubt and obscurity which has enshrouded this branch of rent restrictions law. This was a case which turned on the apparently straightforward issue whether or not the attendance provided by the landlord was sufficient to take the letting out of the Rent Restrictions Acts, but before the decision of the Court of Appeal in this case there was no clear rule laid down for applying to border-line cases.

The relevant sections of the Rent Restrictions Acts are section 12 (2) of the Act of 1920, section 3 (2) of the Act of 1939, and section 10 of the Act of 1923. By section 12 (2) of the Act of 1920 it was enacted that "this Act shall not, save as otherwise expressly provided, apply to a dwelling house *bona fide* let at a rent which includes payments in respect

of board, attendance, or use of furniture". The Act of 1939, by section 3 (2), lays down the same principle in these words: "The principal Acts shall not, by virtue of this section, apply save as is expressly provided in the said Acts, as amended by virtue of this section, to any dwelling-house *bona fide* let at a rent which includes payments in respect of board, attendance or use of furniture". And section 10 of the Act of 1923, which is made to apply to both the provisions set out above, provides that for the purposes of those enactments, "a dwelling-house shall not be deemed to be *bona fide* let at a rent which includes payments in respect of attendance or the use of furniture, unless the amount of rent which is fairly attributable to the attendance or the use of furniture, regard being had to the value of the same to the tenant, forms a substantial portion of the whole rent".

It is the words "substantial portion" which seem to have introduced the greatest measure of uncertainty into these provisions. The question what was a "substantial portion" was left entirely to the trial Judge as a question of fact for him to determine; at one time the Court of Appeal was most chary of attempting to formulate any specific guidance as to what portion was substantial and what was not. See, for instance, *Brown* v. *Robins* (1943), 168 L. T. 340, where the Court of Appeal was invited to lay down as a matter of law that one-eighth was not a substantial portion of the whole, but refused to do this, Scott, L.J., saying, "I think it is better to express no view upon the meaning of the word 'substantial'. It is not an unusual word, but a common word of the English language; it is in the Act, and the learned Judge must apply it, after hearing the evidence". One of the advantages of case-law, however, is its ability to expand with the changing needs of the times. Since 1943 the need for a clear-cut rule to determine what lettings are taken out of the Acts by attendance or the use of furniture has become very much more urgent. Several border-line cases have attracted a great deal of public notice, and there was agitation in favour of new legislation if a more cogent and precise rule could not be spelled out of the existing Acts.

Now in *Palser* v. *Grinling* the Court of Appeal has examined these sections anew, and laid down a much more precise rule of construction for the more doubtful provisions in them, dealing not only with the question what is a "substantial portion", but also with the question which first arises, particularly in relation to attendance provided for blocks of flats, what is "the amount of rent which is fairly attributable to the attendance or the use of furniture".

Morton, L.J., first recapitulated briefly the established law as to what is "attendance" for the purpose of these provisions of the Acts, pointing out that where the dwelling-house is one flat in a block of flats it is not every service rendered by the staff which comes within the meaning of the word "attendance". The removal of refuse from, and the carrying of coal to, a tenant's flat is clearly "attendance": see *Nye* v. *Davis*, [1922] 2 K. B. 56, a decision of the Divisional Court with which Morton, L.J., entirely agreed. But keeping clean the main entrance hall and staircase of a block of flats is not "attendance": *King* v. *Millen*, [1922] 2 K. B. 647; nor is the supply of hot water through a hot water system: *Wood* v. *Carwardine*, [1923] 2 K. B. 185; with both of those decisions Morton, L.J., agreed.

The learned Lord Justice then set out the method which, in his opinion, was the correct method of determining "the amount of rent which is fairly attributable to the attendance, regard being had to the value of the same to the tenant". While conceding that of course the County Court Judge was free to follow the method which he though most appropriate to the

particular case, Morton, L.J., indicated that, in his opinion, the following method was one which should give a fair result to both parties:—

(1) Ascertain the total annual cost to the landlord of providing employees engaged on duties relating to the whole of the flats in the block.

(2) Ascertain how much of the advantage which the tenants obtained from the services of those employees could fairly be described as "attendance", and disregard any attendance to which the tenants had no contractual right.

(3) Consider how far the attendance was for the benefit of the landlord and how far for that of the tenants.

(4) Being now in a position to say what portion of the annual cost is attributable to "attendance" on the tenants, divide that portion between the individual tenants in the proportion of the number of rooms in the various flats, disregarding bathrooms.

(5) Any special circumstances must then be taken into account which justify the attribution to the tenant of the particular flat either more or less than his proportion of the cost of the attendance, the burden being on the tenant to satisfy the Court that less than his arithmetical proportion of the cost should be attributed to him. The question is what attendance the parties have agreed on, not what attendance does the tenant make use of.

(6) For the purpose of the previous question, it is the circumstances existing at the date of the lease which are to be taken into account.

Having arrived at a monetary figure for the amount of rent fairly attributable to the attendance, Morton, L.J., went on to say that after careful consideration he considered that 20 per cent. of the whole rent would be a substantial portion, anything less than 15 per cent. would not, and from 15 to 20 per cent. would be a border-line case. For the purpose of this calculation the gross rent is to be taken as the whole rent, not the net rent after deducting rates. Somervell, L.J., and Asquith, L.J., concurred in the rules enunciated by Morton, L.J., and we therefore now have an authoritative rule laid down as to what constitutes a "substantial portion" of the whole rent for the purpose of lettings with attendance and, as the next case noted shows, lettings with the use of furniture.

(Rent Restrictions Guide, 2nd ed., p. 74.)

Rent Restrictions Acts—furnished lettings—whether rent fairly attributable to the use of furniture forms a "substantial portion" of the whole rent.—The very same day that the Court of Appeal gave judgment in the case of *Palser* v. *Grinling*, it applied the principles there laid down in the appeal from the decision of Henn Collins, J., in the case of *Property Holding Co.* v. *Mischeff*, reported in 175 L. T. 192. That was the case, which attracted a considerable amount of public attention, where the landlord provided linoleum, a refrigerator, a kitchen cabinet and a fitted bathroom cabinet, and Henn Collins, J. (treating these articles as being furniture, as he was bound to do since the decision in *Gray* v. *Fidler*, [1943] K. B. 694) held that the payment for these articles, regard being had to their value to the tenant, constituted a substantial portion of the whole rent; the decision of Henn Collins, J., is noted in *The Conveyancer*, at p. 234, *supra*.

Morton, L.J., in a judgment in which Somervell, L.J., and Asquith, L.J., concurred, dealt first with the method of ascertaining the amount of rent fairly attributable to the use of furniture. The general method should be first to consider the capital value of the furniture in question at the date of the lease, paying no attention to any rise or fall in the value of the furniture after that date. Taking into account the rate of depreciation, the

Judge then has to consider what percentage of the capital value should be regarded as the amount of rent fairly attributable to the furniture; not all furniture is to be assessed on the same basis, and he thought that 15 per cent. (allowed by the trial Judge) was rather high value to attach to furniture of the kind in question in this case. Even allowing 15 per cent., however, on the capital value of £200 placed on the furniture in this case, that only came to £30 per annum. The whole rent was £275 per annum, and applying the rule laid down in *Palser* v. *Grinling* the percentage of the rent attributable to furniture, being less than 15 per cent. of the whole rent, was not to be considered a substantial portion of the whole. The appeal was allowed, therefore, and the landlord's claim for possession (based on the contention that the flat was let furnished) dismissed.

(Rent Restrictions Guide, 2nd ed., p. 74.)

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5. *FAMILY LAW CASES.*

By R. H. GRAVESON, Ph.D., S.J.D., LL.M., Barrister-at-Law.

Separation deed—liability of husband's estate for payment of annuity —Langstone v. *Hayes,* [1946] K. B. 109; 115 L. J. K. B. 225.—This decision of the Court of Appeal contains two points of interest on the drafting and effect of annuity clauses in separation deeds. After the usual recital of the agreement to live apart, the husband in this case covenanted to pay his wife "*for her separate use and for the maintenance and support of herself a clear annuity of £104 payable by weekly payments of £2 each . . .*". The payments were to determine on the parties resuming cohabitation or the wife ceasing to remain chaste. On the death of the husband, the wife claimed a continuation of the annuity from his estate, and appealed from an adverse decision of the county court, relying on Law of Property Act, 1925, s. 80 (1).

The Court refused to be bound by decisions on covenants which, though in many respects similar, were not materially identical with the one under consideration, and, applying normal rules of interpretation of contracts, deduced from the whole document the intention that it was not to extend beyond the joint lives of the parties. The interpretation put by the widow's counsel on Law of Property Act, 1925, s. 80 (1), that the husband's covenant to pay the annuity bound his estate, was rejected by the Court for two reasons: (i) that the whole tenor of the separation deed indicated a contrary intention; and (ii) that the effect of the section was "*not to create a liability on the personal estate, but to extend a pre-existing liability of that estate to the real estate*" (*per* Scott, L.J., 115 L. J. K. B. 227).

In view of the numerous clauses of a personal nature in separation deeds, *e.g.,* against molestation, it is advisable to state clearly whether payment to a wife shall be for the duration of her life and binding on the personal representatives of the husband, or only during the joint lives of husband and wife. Where the payment is expressed to be made to the wife "during her life", reliance can be placed on the House of Lords' decision in *Kirk* v. *Eustace,* [1937] A. C. 491.

(Latey, 13th ed., p. 218.)

Divorce on grounds of desertion—whether failure to prove statutory period on original petition can be remedied by supplemental petition presented after lapse of the full statutory period—Spawforth v. *Spawforth,*

[1946] P. 131.—To this question the Court has, in the past two years, provided two answers. In *Howard-Williams* v. *Howard-Williams,* [1944] P. 85, a case which involved no argument on this point, the Court allowed the period of desertion which ran between the dates of presentation of the original and supplemental petitions to be counted towards the statutory period of three years required by the Matrimonial Causes Act, 1937, s. 2 (b). In the case under review a wife, having failed to establish the full period of desertion at the date of her petition for divorce, filed a supplemental petition after the requisite further period had elapsed. Hodson, J., followed his own earlier decision in *Chapman* v. *Chapman,* [1938] 1 A. E. R. 635 (which was not considered in *Howard-Williams' Case, supra*), and held that the period of time between the two petitions could not be counted towards the statutory three years, since (a) section 2 (b) of the Act of 1937 required that the desertion should be "*. . . for a period of at least three years immediately preceding the presentation of the petition . . .*", and (b) the supplemental petition was part of the original petition, to which it related back, thus excluding desertion between the dates of the two petitions.

It is a somewhat hard rule, capable of working injustice and based on a *dictum* of Lord Hanworth, M.R., in the Court of Appeal (*Sandler* v. *Sandler,* [1934] P. 149), that "*. . . it is impossible to hold that a supplemental petition is anything more than a part of and an amendment to the original petition . . .*". But the Court of Appeal was dealing with a completely different point, that of collusion, three years before the passing of the Matrimonial Causes Act. The argument based on the requirement of desertion for three years "*. . . immediately preceding the presentation of a petition . . .*" has more than one edge. Construing the words of the Act in their ordinary and natural meaning, "*petition*" is not specifically limited to any particular kind of petition, original or supplemental; and if a supplemental petition is a petition at all, the natural meaning of the words of the Act would seem to indicate that the period of three years must immediately precede the presentation of the petition in question, whatever its nature—not some other petition which may have been presented before. Amendments to petitions through circumstances changing after the date of presentation of an original petition are not unknown, and one purpose of a supplemental petition is to bring the original petition up-to-date. There is at least as strong an argument in favour of relating both petitions to the date of the later one as to that of the earlier one. But, as the law now stands, the only remedy on the point under review appears to be to withdraw the original petition and restart the suit at a later date when the full statutory period has elapsed.

(Latey, 13th ed., p. 108.)

Desertion by wife—effect of husband's rejection of her offer to return —Thomas v. *Thomas,* [1946] 1 A. E. R. 170.—The decision of Lord Merriman, P., and Hodson, J., in this case has left little remaining of the principle in *Fitzgerald* v. *Fitzgerald* (1869), L. R. 1 P. & D. 694, that desertion can only arise from circumstances which end or interrupt cohabitation. *Pardy* v. *Pardy,* [1939] 3 A. E. R. 779, had already excluded the principle from cases in which husband and wife were living apart by agreement; *Thomas's Case* now extends the exception (or limits the principle) by holding that desertion may arise where the parties are already living apart as the result of one's wrongful withdrawal from cohabitation, provided that such act was simply an unjustifiable withdrawal uncomplicated by other matrimonial offences such as cruelty or adultery.

In *Thomas* v. *Thomas* the wife deserted her husband without good cause

in March, 1945, and in August of that year obtained an order from justices for payment of maintenance on the ground of her husband's desertion. This apparently quixotic action on the part of the magistrates is explained by the husband's rejection, in June, 1945, of his wife's offer to resume cohabitation.

In dismissing the husband's appeal against the order of the magistrates, Lord Merriman, P., specifically repudiated the statement of Lord Penzance in *Fitzgerald's Case, supra,* at p. 698, that " . . . *if the state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, 'desertion', in my judgment, becomes from that moment impossible to either, at least until their common life and home have been resumed*"; and saw no logical distinction between a separation by consent (*Pardy* v. *Pardy,* [1939] 3 A. E. R. 779) and one caused by the withdrawal of one party only, when such independent withdrawal was unaccompanied by any matrimonial offence. Where such an offence existed the party guilty of it could not " turn the tables " by a mere offer to resume cohabitation.

(Latey, 13th ed., p. 94.)

Desertion — whether constituted by unwarranted refusal of sexual relations—both parties continuing to reside in one home—Weatherley v. *Weatherley,* [1946] 2 A. E. R. 1.—English matrimonial jurisdiction, according to Lord Penzance in *Hyde* v. *Hyde* (1866), L. R. 1 P. & D. 130, is concerned with Christian marriages. One naturally turns, therefore, as did the Court of Appeal in *Weatherley's Case,* to the Book of Common Prayer, setting out in the marriage service the three causes for which matrimony is ordained. Those considerations were particularly relevant in this case, in which the petitioner, a sergeant in the Royal Air Force, was appealing against an order of Bucknill, J., holding that a wife's absolute refusal of marital intercourse, which was intended to be permanent and had continued for more than three years before the date of the petition, did not amount to desertion. The marriage had been consummated and relations were normal for the first nine months, when the wife's change of attitude took place.

Scott, L.J., in a dissenting judgment, considered desertion broadly as " *dereliction from matrimonial duty* " ([1946] 2 A. E. R. 1, at p. 36); departure from the matrimonial home was not an essential ingredient in its connotation—as, for example, where one spouse is driven out by the conduct of the other. " *The essence of the offence* " (of desertion), stated the learned Lord Justice, " *is dereliction from matrimonial duty of so serious a kind as to disrupt the matrimonial home* ": *id.,* at p. 34.

A narrower view of the nature of desertion, based on pre-1937 precedent, prevailed in the majority opinions of the Court. The motivating principle of these opinions appeared to be (a) the possibility of making a judgment effective (*Forster* v. *Forster,* 1 Hag. Con. 144); (b) that desertion can only arise through a cessation of cohabitation (*Orme* v. *Orme* (1824), 2 Add. 382; *Fitzgerald* v. *Fitzgerald* (1869), L. R. 1 P. & D. 694), even though there may be no matrimonial home (*Pulford* v. *Pulford,* [1923] P. 18), and, above all, (c) reluctance to define desertion, since " *on no occasion has the Court ever attempted to formulate an exhaustive definition* ": *Weatherley* v. *Weatherley,* [1946] 2 A. E. R. 1, at p. 7, *per* Tucker, L.J. It has almost become a precedent that desertion shall not be defined.

Evershed, J., dealt effectively with the attempt to extend the meaning of " desertion " as used in the Matrimonial Causes Act, 1937, beyond the scope it had occupied for the previous century and a half. He held that

the recommendation of the Gorrell Commission of 1912 to establish as a ground for desertion refusal of intercourse for not less than three years constituted a reason for not extending the meaning of the word in the 1937 Act, since the recommendation had not been specifically embodied in the text of the Act.

One fact of common experience does not appear from reports to have been considered by the Court, namely, the economic and practical impossibility of finding and paying for two homes, particularly for a Service man. He is lucky indeed who has managed to find one home, and doubly lucky if he can maintain it on Service pay. The common-sense reluctance of a husband to leave his home because he has grounds for leaving his wife is a very real factor to-day in keeping together under one roof couples who are married in name only.

The husband's appeal was dismissed, leave being given to appeal to the House of Lords. Let us hope that the law of desertion will progress from the atomistic stage of "Lo! here" and "Lo! there" to a definite general principle more in accord both with the common needs of life and with the dissenting judgment delivered in this case.

(Latey, 13th ed., pp. 93, 94.)

Divorce or nullity?—second marriage—disappearance of husband in first marriage — desertion by husband in second marriage — Tweney v. *Tweney,* [1946] 1 A. E. R. 564.—There is in English law a useful, common-sense presumption that where a man and a woman have for a considerable time lived as married and held themselves out as such they will be treated as married on the strength of repute until the contrary is shown. Behind this presumption lies the deeper principle that society and law alike favour the institution of marriage: Eversley, *Domestic Relations,* 5th ed., p. 5.

In *Tweney* v. *Tweney* the petitioner had married A in 1920, but he deserted her six months later and, despite the fullest inquiries, could not be traced. In 1932 she married T., who deserted her in 1941. In 1945 she presented a petition for divorce from T. on the grounds of his desertion.

Pilcher, J., granted a decree *nisi* on the petition on the ground that, "*The petitioner's marriage to the respondent being unexceptionable in form and duly consummated remains a good marriage until some evidence is adduced that the marriage was, in fact, a nullity*": [1946] 1 A. E. R. 564, at p. 565. In this view he had the support of precedent (*Spurgeon* v. *Spurgeon* (1930), 46 T. L. R. 396); but the validity of the marriage could have been put on a higher plane by the presumption of law that a person is dead who has not been heard of for seven years by those who, if he were alive, would probably have heard from him: *Nepean* v. *Doe,* 2 M. & W. 894. This, too, should have removed the doubt which the learned Judge originally expressed as to whether a petition against the first husband under section 8 of the Matrimonial Causes Act, 1937, would not have been appropriate.

That divorce of the second marriage is the better choice there can be little doubt. A decree on the first marriage, rendering the second a nullity, carries with it obvious implications. Furthermore, the jurisdictional question of the domicil of a person not heard of for many years is not without difficulty. The practice now appears to be settled in a very satisfactory way.

(Latey, 13th ed., p. 84.)

Nullity of marriage on grounds of undisclosed venereal disease—Matrimonial Causes Act, 1937, *s.* 7 (1) (*c*)—*doctor's duty of disclosure—C.* v. *C.*, [1946] 1 A. E. R. 562.—A direction of considerable importance in cases arising under section 7 (1) (c) of the above Act was given by Lewis, J., with the approval of Lord Merriman, P., in a case in which the evidence of a doctor as to the date of incidence of venereal disease in one of the parties to a marriage was vital to the determination of whether the presentation of a petition for nullity had any hope of success, that is, the information was a *prerequisite* to the presentation of the petition. It was not sufficient for the doctor to give evidence on *subpœna* during the hearing.

The information called for related to the petitioner, and was requested jointly by both parties. The doctor, while at all times prepared to testify in the course of proceedings, claimed the protection of the secrecy granted to the work of V.D. clinics so far as concerned disclosure of confidential information before the hearing. Lewis, J., held that the information requested "*to assist the course of justice*" should have been given, and while upholding the importance of secrecy in such matters and the maintenance of the confidential relationship of doctor and patient, stated, "*. . . those considerations do not justify a doctor in refusing to divulge confidential information to a patient or to any named person or persons when asked by the patient so to do*": [1946] 1 A. E. R. 562, at p. 563. Since the obligation of secrecy is imposed for the benefit of the patient, the direction given above is as soundly founded on common sense as the principle *volenti non fit injuria.*

(Latey, 13th ed., p. 179.)

Hindu marriages—recognition—whether English Court has jurisdiction to dissolve—Srini Vasan v. *Srini Vasan,* [1946] P. 67; 114 L. J. P. 49; *Mehta* v. *Mehta,* [1945] 2 A. E. R. 690; *Baindail* v. *Baindail,* [1946] P. 122.—There has long been apparent inconsistency between the treatment of foreign marriages of an un-English nature in the High Court and in the Judicial Committee of the Privy Council. While the High Court, whose statutory jurisdiction in matrimonial causes is founded on the outworn basis of ecclesiastical law, could extend its remedies only to "Christian" marriages as defined by Lord Penzance in *Hyde* v. *Hyde* (1866), L. R. 1 P. & D. 130; *Re Bethell* (1888), 38 Ch. D. 220; *Brinkley* v. *Att.-Gen.* (1890), 15 P. D. 76, the Judicial Committee has long exercised in a realistic fashion its broad appellate jurisdiction over marriages of all kinds within the British Empire (see W. E. Beckett, 48 *Law Quarterly Review,* 345)—a group of territories in which monogamy is the exception rather than the rule. The first incursion into the High Court's doctrine of "*the voluntary union for life of one man and one woman to the exclusion of all others*" was the acceptance of jurisdiction over a Russian marriage which in effect allowed progressive polygamy (*Nachimson* v. *Nachimson,* [1930] P. 217), since the parties could put an end to their relationship at will. The recent triple frontal assault launched on the doctrine of Christian marriage by the cases noted here has done much to reconcile the attitude of the High Court and the Judicial Committee.

In *Srini Vasan's Case* (the case was undefended) the respondent, a Hindu domiciled in Madras, married first a Hindu woman in India in 1933, and in 1936 went through an English form of marriage in England with the petitioner, an Englishwoman. The Hindu marriage was potentially polygamous in the sense that under Hindu law the respondent could legally marry a second wife. Barnard, J., recognised the Hindu marriage and granted a decree of nullity on the grounds that, "*To deny recognition of a Hindu marriage for the purpose in hand would, in my opinion, be to fly*

in the face of common sense, good manners and the ordered system of tolerance on which the Empire is based". It was, it may be added, necessary to recognise the pre-existing marriage in order to give the deserted English wife the relief for which she was asking. But for Hindus marriage is indissoluble, and it could be argued that the law of the husband's domicil would regard his second marriage as valid. Both parties had capacity by the laws of their respective domicils, and local forms were observed, with the one material exception that the husband described himself as a bachelor at the time of his English marriage. The argument is strengthened if one adopts the view that the capacity of both parties to marry is governed by the law of the husband's domicil at the date of marriage, a view which, however, enjoys more juristic than judicial support.

The Court of Appeal in *Baindail* v. *Baindail* followed *Srini Vasan's Case* on very similar facts but on somewhat different grounds, the Master of the Rolls pointing out that the observations of Lord Penzance in *Hyde* v. *Hyde* were limited by him to the question in issue in that case. In the present case the problem *"requires to be approached de novo and from quite a different angle"*; the simple question was, *". . . when the appellant took the respondent to the registry office was he, or was he not, a married man so as to be incapable of entering into another legitimate union?"* The question is purely one of recognition of status, which in matrimonial matters is governed by the personal law of the individual—in this case by the law of his domicil. It is noteworthy that the Court was influenced by the circumstance that the Privy Council might recognise the validity of a Hindu marriage on an Indian appeal.

The Master of the Rolls expressly limited his opinion to the case before him; he gave no authority for the view that *"for every purpose and in every context an Indian marriage such as this would be regarded as a valid marriage in this country"*, as, for example, in questions of bigamy.

Perhaps the greatest authority for the recognition of Indian marriages for purposes of English law is the decision of the Committee of Privileges in what is known as the *Sinha Peerage Case* (1939), 171 Lords Journals, 350, a decision of great value in questions affecting the rights and property in England of issue of an Indian marriage. The potentially monogamous type of marriage there involved was similar to that considered in *Mehta* v. *Mehta.* In that case the husband was a member of a Hindu sect practising monogamy, though he could, by leaving his sect, marry a second wife. The wife, domiciled in England, went through a form of Hindu marriage in India, believing it to be a ceremony of conversion to the Hindu faith; and petitioned for a decree of nullity on the ground that she had never agreed to marry. In accepting jurisdiction the Court applied a liberal, though not illogical, construction to the doctrine of Christian marriage, holding that it was initially monogamous in character. Following *Nachimson* v. *Nachimson,* [1930] P. 217, Barnard, J., remarked: *"It may well be that such a marriage, according to the laws of different countries, can be either got rid of or altered in accordance with those laws; all this Court must consider is the marriage contract in its inception. . . ."* The Court of Appeal, as stated above (*Baindail* v. *Baindail,* [1946] P. 122), has now provided a simpler test in cases of this kind. But, one may ask, is not the Court consciously or unconsciously influenced in recognising a Hindu marriage as valid by the need to treat an English marriage as void? May not the need to do justice to a deserted English petitioner count at least as much in the mind of the Court as the "decency and order" involved in recognition in one part of the Empire of a marriage validly contracted in another part? Whatever the *ratio decidendi,* the practical result is achieved.

(Latey, 13th ed., p. 9.)

6. *INCOME TAX CASES.*

By LEONARD STEIN, Barrister-at-Law.

Income tax—divorce proceedings—tax-free payments to wife for maintenance of children—effect on husband's tax liability—Income Tax Act, 1918, *s.* 17.—In *Spencer* v. *Robson,* Tax Leaflet, No. 1370, the appellant had been ordered, in divorce proceedings, to pay to his wife certain tax-free annual sums for the maintenance and education of the children of the marriage. In computing his tax liability, the Revenue authorities, applying section 17 of the Income Tax Act, 1918, had kept in charge the amount of the maintenance payments, grossed to tax at the full standard rate, and had restricted his reliefs and allowances accordingly. The appellant contested the application of section 17, above, in respect of the maintenance payments, contending that they formed no part of the income either of the children or the wife, and were not of the nature of annual payments in the income tax sense, but were merely fixed sums ordered to be paid by him in the discharge of his parental responsibilities. That such payments as those in question do not become income of the children is established by the decision in *Stevens* v. *Tirard* (1940), 23 Tax Cas. 321, but in that case the Court of Appeal was clearly of opinion that they do fall to be treated as income of the wife. It is true that on this latter point the observations of the Lords Justices were, strictly speaking, *obiter,* since the only question which had actually to be decided was whether, by reason of the maintenance payments, the child had, in his own right, an income exceeding £50, so as to bar the father's claim to child allowance. In *Spencer's Case,* above, Macnaghten, J., decided the point in conformity with the view taken in *Stevens* v. *Tirard,* holding that the maintenance payments for the benefit of the children were income of the wife. The appellant contended that, even so, the Revenue authorities were in error in keeping in charge the amount of the tax-free payments, grossed to tax at the full standard rate, since, in doing so, they ignored the distinction, discussed in (among other cases) *Re Maclennan,* [1939] Ch. 850, between an annual payment of £x free of tax and an annual payment of such amount as will, after deduction of tax, leave £x. In the case of an annual sum payable free of tax, the recipient's reliefs and allowances must, it was argued, be taken into account in computing the gross equivalent, and the true gross equivalent must, of necessity, be less than the net amount grossed at the full standard rate. This contention was rejected by the learned Judge, who held that it was disposed of by the decision of the House of Lords in *Cook* v. *C. I. R.,* [1946] A. C. 1 (see *The Conveyancer,* December, 1945, at pp. 118–119). The full implications of that decision are not yet clear, and *Spencer* v. *Robson* is of interest as the first reported case in which it has been applied.

Surtax—tax-free testamentary annuity—testator domiciled in Ceylon—whether stated amount to be grossed by reference to United Kingdom tax.—In *Havelock* v. *Cobham-Grant,* [1946] Taxation Reports 217, a testator had bequeathed to his widow "annually during the term of her natural life . . . such a sum of money as will after deduction of income tax amount to a net sum of £2,000 sterling of lawful money of the United Kingdom". The testator was domiciled in Ceylon, and most of his property was there, though he had some assets in the United Kingdom. The will was made in the United Kingdom. The widow was domiciled in Ceylon but resident in the United Kingdom. The question which arose for decision was whether the annual sum payable to the widow under the will was an annual sum of

such amount as, after deduction of United Kingdom income tax, would leave the stated amount, or whether the reference to income tax in the will was to be construed as relating, and relating only, to Ceylon tax. It was held that, in the case of a testator domiciled in Ceylon, there was a presumption—though not an irrebuttable presumption—that the will must be interpreted by reference to the law of Ceylon; that the question was purely one of construction; and that there was nothing in the terms of the will or in such relevant facts as were proved before the Appeal Commissioners to warrant the inference that the testator had intended a reference to United Kingdom tax.

Income tax and surtax—transfer of assets abroad—transfer by individual other than individual having power to enjoy—whether removal of company out of United Kingdom an associated operation—extent to which income of the person abroad to be deemed income of person having power to enjoy—Finance Act, 1936, *s.* 18.—*Congreve* v. *C. I. R.,* [1946] 2 A. E. R. 170, raised several interesting and important questions on section 18 of the Finance Act, 1936, which is concerned with the avoidance of income tax by transfers of assets resulting in income becoming payable to persons abroad. The scheme of the section is, as is well known, that where, by means of such a transfer, either alone or in conjunction with associated operations, an individual resident in the United Kingdom has acquired rights by virtue of which he has power to enjoy income of a person abroad, that income is to be treated, for tax purposes, as income of that individual. The first question considered in *Congreve's Case,* above, was whether section 18 applies only to an individual who has himself made such a transfer as is described in the section, or whether—as contended by the Crown—it is enough that, as a result of such a transfer, the individual has power to enjoy income of a person abroad, even though the transfer was not made by him but by someone else. It was held by Wrottesley, J., that the section applies only where the individual having "power to enjoy" is the individual who effected the transfer of assets, subject to the qualification that it is immaterial whether the transfer was made by the individual himself or by an agent on his behalf, and that a transfer must be treated as having been made by or on behalf of the individual where it is made by a company wholly under his control. The next question was whether the section was applicable where assets had been transferred to a company which, at the time of the transfer, was resident in the United Kingdom, but subsequently removed itself out of the United Kingdom. On this point the learned Judge decided in favour of the taxpayer on the ground that it was a pre-requisite of the application of the section that the transfer should have been one by virtue or in consequence of which, either alone or in conjunction with associated operations, income became payable to a person abroad. What had caused the income of the transferred assets to become payable to a person abroad was the company's removal out of the United Kingdom, and this was not an associated operation within the definition in sub-section (2) of section 18, since it could not properly be described as an operation in relation to the assets transferred, or assets representing them, or income arising therefrom. Lastly, the learned Judge gave a decision on the vexed question—discussed but not disposed of in *Lord Howard de Walden's Case* (1941), 25 Tax Cas. 121—of the extent to which the income of the person abroad is to be attributed to an individual having "power to enjoy" within the meaning of section 18. Is an individual caught by section 18 to be taxed upon the whole income of the person abroad, irrespective of the extent to which it arises from the assets transferred by the individual, or only upon the income attributable to those assets?

Drawing attention to the fantastic consequences which might, in certain circumstances, result from the adoption of the more oppressive view, the learned Judge found the necessary guidance in sub-section (4). That sub-section was, in his opinion, designed to prevent the extravagant results that might flow from a literal reading of the preceding provisions of the section by authorising the Special Commissioners, and, on appeal, the Court, to consider the substantial result and effect of the transfer and associated operations. This might tell in some cases in favour of the Crown, but it told in favour of the taxpayer where the question was whether the income to be treated as his was the entire income of the person abroad, or only that part of it which was referable to the assets which had been transferred by him or on his behalf or under his direction.

Surtax—annual payments under deed of covenant for benefit of children —no payments made under deed—payments by covenantor for children's maintenance claimed as deductions from total income—Income Tax Act, 1918, *s.* 27 (1) (*b*).—By an irrevocable settlement made in 1930, a father covenanted with trustees to make monthly payments to them for the maintenance and education of his children, the trustees being the covenantor and his wife. The covenantor did not make any payments to the trustees. No bank account was ever opened in the name of the trust nor were any trust accounts kept. On the other hand, the covenantor was in a position to show that in every year after the execution of the deed he had, in fact, expended on the maintenance and education of the children amounts substantially in excess of the net amount of twelve months' payments under the deed. In 1943, his wife—his co-trustee—concurred in a memorandum whereby it was declared that part of the sums which had, in fact, been expended by him for the benefit of the children were appropriated in discharge of his obligations under the deed. These were the facts in *C. I. R.* v. *Compton,* Tax Leaflet, No. 1374, in which the Crown appealed against a decision of the Special Commissioners to the effect that the covenantor was entitled to treat the monthly sums payable under the deed as deductible charges in the computation of his total income for surtax purposes. Wrottesley, J., had no hesitation in allowing the Crown's appeal, holding, in the light of section 27 of the Income Tax Act, 1918, that the deduction was not allowable unless the covenantor could show that the covenanted sums had actually been paid, and that the memorandum prepared in 1943 could not alter the position in his favour, however true it might be that, in proceedings in the Chancery Division for the enforcement of the covenant, he might well be allowed to bring his expenditure for the benefit of the children into account.

Surtax — companies surtax — investment company — apportionment — member able to secure application of income for his benefit—Finance Act, 1939, *s.* 15 (2), (3).—Section 15 (2) of the Finance Act, 1939, which forms part of the companies surtax legislation, provides (*inter alia*) that in apportioning the income of an investment company, the Special Commissioners may apportion such part of the income as appears to them to be appropriate to (among other classes of persons specified in the sub-section)

> "any person who is a member of the company and in their opinion is, or is likely to be, able to secure that income or assets, whether present or future, of the company will be applied either directly or indirectly for his benefit to a greater extent than is represented in the

value for apportionment purposes of his relevant interests in the company, considered in relation to the value for those purposes of the relevant interests of other persons therein; ".

Sub-section 15 (3) goes on to provide that

" a person shall be deemed to be able to secure that income or assets will be applied for his benefit if he is in fact able so to do by any means whatsoever, whether he has any rights at law or in equity in that behalf or not. . . ."

The decision in *Hulme Estate Co., Ltd.* v. *C. I. R.*, [1946] Taxation Reports 175, supplements that in *C. I. R.* v. *L. B. (Holdings), Ltd.*, [1946] 1 A. E. R. 598 (see note in *The Conveyancer*, June, 1946, at pp. 236–237) as an illustration of the construction to be put upon the words in sub-section (3), above, " by any means whatsoever ". The very complicated facts of the *Hulme Estate Co. Case*, above, need not here be set forth in detail. As the result of a long series of involved transactions, a member of the company, X, had got himself into a position in which he was at once in control of the company and in control of a trust fund consisting of shares in the company held on trusts for the benefit of his children. By means of combined operations in his dual capacity as governing director and trustee, he could, if he chose, divert the whole of the company's income to himself. It was clear, however, that this would involve a dereliction of duty on the part of X in his capacity as trustee, and it was arguable—perhaps more than arguable—that, if the intervention of the Court were invoked for the protection of the children's interests, X would be compelled to disgorge. However that might be, it was held by Wrottesley, J., following the decision in the *L. B. (Holdings) Case*, above, that, where the *de facto* position was what it was shown to be in the case under consideration, it was no answer to say that the application of moneys for the benefit of X would involve a breach of trust, or that X could, in the unlikely event of proceedings being instituted, be compelled to make restitution. It was argued, on behalf of X, that even if X could be said to be able to secure the application of the company's income for his benefit, the application would not be an application by the company, since X could only get control of the money by invoking the trust deed. To this the short reply was that due weight must be given to the words in sub-section 2 (c), " either directly or indirectly ", and that this was just the kind of case which these words must have been intended to cover.

THE LIBRARY.

Rent Restrictions Guide. By Lionel Blundell, Barrister-at-Law. Second Edition. London: Sweet & Maxwell, Ltd., and Estates Gazette, Ltd. 1946. pp. xxiii and 166. (12s. 6d.; paper boards.)

The Rent Acts. By R. E. Megarry, Barrister-at-Law. Second Edition. London: Stevens & Sons, Ltd. 1946. Part I (Text); Part II (Statutes). pp. xvi and 210. (10s. 6d.; paper.)

One embarks on a review of any work on the Rent Acts with the same modesty as those who are assiduous enough to write books on this very baffling subject. Both of these books should be of very considerable assistance to practitioners. Mr. Blundell's book contains in one work a general exposition of the subject, with

the Acts following, including the Act of 1946 in connection with Rent Control of Furnished Houses, the Increase of Rent and Mortgage Interest (Restrictions) Rules and other Rent (Restrictions) Rules and Regulations and, very usefully, certain Defence Regulations and the material parts of the Building Materials and Housing Act, 1945. This book is strongly to be recommended because it is written in language as clear as is practicable in connection with so technical a subject. So far as it has been possible to test it, the work seems to be accurate and complete. There is apparent, here and there, the difficulty in conveying to the reader the answer to the question whether the remarks apply both to 1939 and pre-1939 control. For example, although at p. 40 the provisions of section 7 (I) of the 1923 Act are mentioned, it does not seem to be made clear whether that section does or does not apply to 1939 controlled houses. This point is, however, covered (if one turns to the text of the Act), by footnotes on pp. 109 and 110. This reviewer finds the layout of the book attractive, and it is clear that considerable efforts have been made to assist the practitioner by explanatory observations.

What has been said above concerning Mr. Blundell's book can also be said concerning Mr. Megarry's book, except that the text of the Acts is published separately, as Part II. Although the work is short, the footnotes and references are copious and this reviewer has not observed the omission of any important case. It is undoubtedly extremely good value for money.

Though comparisons are odious they must sometimes be made. Mr. Megarry appears to have concentrated upon accuracy of statement for the benefit of the enlightened, rather than upon the enlightenment of those in darkness. This statement involves no criticism: it is, indeed, a tribute. Mr. Blundell, on the other hand, appears to have said to himself: "The poor chaps who read this will want to know not merely what the sections say, but what they mean. I can't tell them that, but I can and will explain to them in the plainest possible terms what the Courts seem to have thought that they meant." Practitioners will be well advised to buy both works; but if a choice had to be made by one who, like this reviewer, has read, but does not understand, the Rent Acts, I think that he would be well advised to select Mr. Blundell's book. The advantage of being able to turn to the Acts, the Rules and so forth in the same volume is considerable.

To the initiated, however, I can well imagine that Mr. Megarry's work will prove more acceptable. Although both these books are very much up to date I should perhaps remind readers of this Review that the Court of Appeal on July 30 of this year overruled *Property Holding Co.* v. *Mischeff*, [1946] 1 A. E. R. 406; 62 T. L. R. 246, and in *Palser* v. *Grinling* made some very useful observations on "attendance" and the proper method of computing the amount of rent attributable to attendance. At the moment of writing the only report of these appeals is that which appeared in *The Times* newspaper on July 31, 1946 (see also pp. 60–64, *ante*). (These cases are dealt with in an addendum to Mr. Megarry's book).

E. O. WALFORD.

Law Quarterly Review. July 1946. London: Stevens & Sons. (7s. 6d.; annual subscription £1 5s.)

The *Law Quarterly Review* contains all its usual features. Among the articles is one of special interest to Conveyancers, namely, that by Mr. F. H. Newark on Public Benefit and Religious Trusts. In this article Mr. Newark suggests on the basis of existing authorities that trusts for the advancement of religion need not necessarily be for the public benefit in order to be charitable. It is an instructive article and worth the most careful consideration. Nevertheless we feel that the Courts are definitely moving in the opposite direction from Mr. Newark and that draftsmen should act accordingly. Mr. E. Wolff argues that a clause in a power of attorney that it shall not be revoked by the death of the donor is effective in favour of third parties regardless of whether or not they have notice of the death. Dr. Farnsworth analyses the position of "Fact" or "Law" in cases stated under the Income Tax Act. Altogether a number well worthy of the practitioners' close attention.

The Law relating to Building Societies. By E. A. Wurtzburg. Ninth Edition by G. W. Knowles, M.A., Barrister-at-Law. London: Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd. 1946. pp. xxx and 293. (£1 5s.; cloth.)

A book which has reached its ninth edition needs little introduction. The first edition was published some sixty years ago, and this work may be compared with an old wine which, it is said, needs no bush. It is a short book upon a vast subject. Nevertheless, a short book has a special value in connection with highly technical branches of the law. It presents the main outlines of the subject to the student or busy practitioner in such a manner that he can often get on the right track more quickly by referring to it than would be possible by consulting the larger work which the specialist would require.

The style of the book is terse and clear and the notes, which are excellent, will be found of great practical value.

As sometimes happens with works first published many years ago, and particularly where some of the ruling statutes were passed about seventy years ago, a certain amount of deadwood is apt to remain. For example, the reference to infant "heirs" in the Act of 1874 was no doubt quite intelligible at that time but the repetition (without explanation of its present-day effect) of the provisions of section 30 of the 1874 Act concerning the right to make payments up to £150 to the administrator of an intestate member who left an infant heir makes curious reading in 1946, particularly in view of footnote 20 on p. 79 which appears to suggest that in such cases moneys in excess of £150 must be paid into Court.

In a short review the necessity for explaining this microscopic point causes it to bulk large in a short review which does not do justice to the merits of the book which this reviewer has no hesitation in recommending as an accurate and clear guide to Building Society law. The Building Societies Act, 1939, and the Courts (Emergency Powers) Act, 1943, are printed in full as are also the Building Societies Acts, 1874 to 1894.

E. O. W.

Pollock's Principles of Contract. Twelfth edition. By P. H. Winfield, K.C., F.B.A., LL.D., Emeritus Rouse Ball Professor of English Law, Honorary Bencher of the Inner Temple. 1946. London: Stevens & Sons. (£2.)

"Pollock" is a classic, or if not a classic at least a work of authority, and as such requires no general notice here. The name of the learned editor is sufficient warranty of the accuracy of the editing which follows upon the lines of incorporation of the new matter in square brackets. This somewhat ungainly treatment of new matter is rendered necessary by the authoritative character of the work of the learned author and, if we may say so, is done as unobtrusively as such dovetailing can be.

It must not be assumed from what we have said that the learned editor has confined himself to incorporating authorities and matter arising since the last edition by the learned author. This is not so. In various places the learned editor has incorporated work of his own to the benefit of the book. He has also added a new chapter on "*Remedies for Breach of Contract*". This he has intentionally kept down in size. It is an admirable summary of the law relating to damages, but from a practical point of view the topic of specific performance is too lightly dealt with—partly because some of its most difficult aspects, *e.g.*, misrepresentation, appear elsewhere in the treatise. The essential difficulty is that Pollock's treatment of the subject was not intended to include Remedies, and, therefore, it is almost impossible to add a wholly satisfactory chapter. We should be thankful for what we have. Practitioners should buy this edition.

BOOKS RECEIVED.

Burke's Loose Leaf War Legislation. 1944–45, Parts 11 to 16. 1945–46, Parts 1 to 8. Hamish Hamilton (Law Books), Ltd.

The Law of Trade Unions. By H. SAMUELS. Second Edition. 1946. Stevens & Sons, Ltd. pp. xv and 96. (6s net.; paper boards.)

Quarter Sessions Handbook. By LINTON THORP, K.C., and RAYMOND E. NEGUS. Second Edition. 1946. Stevens & Sons, Ltd. pp. ix and 128. (6s. net.; paper.)

CORRESPONDENCE.

LEASES FOR THREE YEARS AND UNDER

Dear Sirs,

In Halsbury's *Laws of England,* 2nd ed. (1936), on page 57 of volume 20, there are set out various statements as to the present law relating to leases for three years and under.

There is a reference to the provisions of section 54 (2) of the Law of Property Act, 1925, and the learned authors state:—

> "The three years are computed from the date of the making of the lease and if the term does not commence at once it must expire or be capable of expiring within three years from that date".

The authority for this statement being *Rawlins* v. *Turner* (1699), 1 Ld. Raym. 736. Surely the remarks of the learned authors are inconsistent with the wording of section 54 (2) which refers to the creation by parole of leases *taking effect in possession* for a term not exceeding three years. If the learned authors are right, then a tenancy agreement for three years exactly may not be exchanged and dated even one day before the commencement of the term, and to enable the parties to have their documents it means either that the agreement must be executed under seal as being dated before the commencement of the term of three years or alternatively that the documents must be held in escrow pending the commencement of the term and then dated.

I think I am right in saying that it is generally accepted that as long as the term does not exceed three years that the documents can be under hand irrespective of the date thereof, and if it is not so then the effect is that those documents under hand will merely become agreements for the granting of a lease, which should be followed up by the grant thereof.

I should much appreciate your observations.

Note.—With respect we think that our learned correspondent has overlooked the fact that a lease granted to-day, but the term commencing to-morrow, is *not* a lease to take effect in possession but a lease to take effect in future. Hence section 54 (2) cannot apply to such a grant irrespective of the length of the term. When *Rawlins* v. *Turner* (*supra*) was decided, of course it was not possible to grant a lease to take effect in future. The only effect of such a lease was to create an *interesse termini* which was not an estate in land at all. The decision was to the effect that the Statute of Frauds related to the date of the agreement to grant a term and not to the date at which the term commenced. In our opinion *Rawlins* v. *Turner* (*supra*) does not strictly apply to section 54 (2) of the Law of Property Act, because the language of the old Statute of Frauds (section 2) was different and it was there held that the three years must run from the making of the lease and not from the date of the term, because the making of the lease operated as an agreement from that date. Here the words of the Act are more positive, the lease to be created by parole must be a lease to take effect in possession and it is submitted that this can only mean "immediate possession".